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IN THE

Supreme Court of the United States

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THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A., FATUMA NYAWANG GARBANG, NYOT TOT RIETH, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF HER HUSBAND JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KEIGWONG RAT, LUKA AYOUL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG,

Petitioners,

v.

TALISMAN ENERGY INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether federal courts lack subject matter jurisdiction under the Alien Tort Statute to impose liability on corporations for torts committed in violation of customary international law, given that no international law norm recognizing corporate liability has been "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [this Court has] recognized." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

2. Whether federal courts lack subject matter jurisdiction to apply the Alien Tort Statute extraterritorially to claims for violations of customary international law arising entirely outside the United States.

3. Whether the courts below erroneously created causes of action for violations of customary international law where (i) the claims are based on events arising solely outside the United States and had no effect on the United States whatsoever, (ii) the claims are asserted against a foreign defendant not in the custody of the United States and (iii) a country providing an adequate alternative forum has a close nexus to the dispute.

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court, respondent Talisman Energy Inc. states that it is a nongovernmental corporate party that has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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Talisman Energy Inc. respectfully conditionally cross-petitions this Court for a writ of certiorari. If the Court grants petitioners' Petition for a Writ of Certiorari, it also should grant certiorari to review the judgment of the District Court with respect to the three Questions Presented.

These questions of subject matter jurisdiction necessarily and logically precede the questions presented by petitioners. If the District Court lacked subject matter jurisdiction under the Alien Tort Statute to adjudicate this action, then it is unnecessary for the Court to address the questions presented in petitioners' Petition.

OPINIONS BELOW

The opinion of the Second Circuit is reported at 582 F.3d 244 (2d Cir. 2009), and reprinted in the petitioners' Petition at Pet. App. A. The opinion of the District Court is reported at 453 F. Supp. 2d 633 (S.D.N.Y. 2006), and reprinted in the petitioners' Petition at Pet. App. B.

JURISDICTION

Petitioners seek review of a final decision of the court of appeals entered on October 2, 2009. Rehearing and rehearing en banc were denied on November 3, 2009. Petitioners' Petition was docketed on April 20, 2010. This Conditional Cross-Petition is filed pursuant to Supreme Court Rule 12.5 This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Alien Tort Statute, 28 U.S.C. § 1350 (the "ATS"), provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

STATEMENT OF THE CASE

Petitioners, purporting to represent a class of hundreds of thousands of southern Sudanese, commenced

this action against Talisman Energy in November 2001. After adding the Government of Sudan as a defendant in a First Amended Complaint, petitioners filed a Second Amended Complaint in August 2003.

In their Second Amended Complaint, petitioners alleged that Talisman Energy conspired with the Government of Sudan to commit, or aided and abetted the Government of Sudan in committing, three crimes recognized under international law, *i.e.*, genocide, crimes against humanity, and war crimes.[1]

After Talisman Energy's motion to dismiss was denied, the parties proceeded to discovery, during which Talisman Energy produced approximately 1,000,000 pages of documents and the parties took 95 depositions, mainly outside the United States. In April 2006, Talisman Energy moved for summary judgment.

A. The District Court Grants Talisman Energy Summary Judgment on Petitioners' Claims

The Southern District of New York (Cote, J.) granted Talisman Energy's motion for summary judgment. The District Court followed this Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and held that under the ATS any norm of complicit liability upon which a claim is based must be found in international law, not federal common law. The court then considered whether international law recognized conspiracy liability and held

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[1] As the Second Circuit recognized, petitioners "subsequently abandoned the claim of direct liability and elected to proceed against Talisman only on the claims of aiding and abetting and conspiracy." Pet. App. A-11.

that "the offense of conspiracy is limited to conspiracies to commit genocide and to wage aggressive war." Pet. App. B-57. Because petitioners never brought a claim for waging aggressive war and had abandoned their genocide claim, their conspiracy claim failed.

Next, the District Court undertook to define the elements of aiding and abetting liability under the ATS, as derived from international law. After a comprehensive survey of international law sources, the District Court held that:

> To show that a defendant aided and abetted a violation of international law, an ATS plaintiff must show:
>
> 1. that the principal violated international law;
>
> 2. that the defendant knew of the specific violation;
>
> 3. that the defendant acted with the intent to assist the violation, that is, the defendant specifically directed his acts to assist in the specific violation;
>
> 4. that the defendant's acts had a substantial effect upon the success of the criminal venture; and
>
> 5. that the defendant was aware that the acts assisted the specific violation.

Pet. App. B-69.

As to petitioners' aiding and abetting genocide claim, the District Court held that petitioners had not produced admissible evidence that Talisman Energy was aware of any genocide in Sudan and, even if it was, that petitioners did not produce any

admissible evidence that Talisman Energy intended to further its commission. Pet. App. B-73.

As to aiding and abetting war crimes and crimes against humanity, the court identified the types of "substantial assistance" that petitioners alleged Talisman Energy provided: (1) upgrading airstrips; (2) designating certain areas for oil exploration; (3) providing financial assistance to the Government of Sudan through the payment of royalties; (4) giving general logistical support to the Sudanese military; and (5) various other acts. Pet. App. B-78.

The District Court held that the airstrips at issue were operated by Greater Nile Petroleum Operating Company Limited ("GNPOC"), the oil company in which Talisman Energy's indirect subsidiary held a 25% share, and that there was no evidence that Talisman Energy upgraded or improved those airstrips. Pet. App. B-84. The court also held that there was no evidence that Talisman Energy was involved in any discussions designating areas for expanded oil exploration, let alone that it considered such discussions to be a pretext for attacking civilians. Pet. App. B-85. The court found no admissible evidence that oil revenue resulted in increased military spending by the Government of Sudan. The court also held that, even assuming such a relationship existed, oil-related payments to the government of Sudan were insufficient to establish liability because there was no evidence that Talisman Energy specifically directed payments to military procurement or that it intended to aid international law violations. As to the construction of roads and the provision of fuel to the military, the court held that any such assistance was provided by GNPOC, not by Talisman Energy. Finally, the court held that there

was no admissible evidence that any other activities allegedly undertaken by Talisman Energy constituted "substantial assistance" in the commission of a violation of international law. Pet. App. B-90. Fundamentally, the court concluded that "[t]he activities which the plaintiffs identify as assisting the Government in committing crimes against humanity and war crimes generally accompany any natural resource development business or the creation of any industry."[2] Pet. App. B-78.

Although not necessary for deciding the summary judgment motion, the District Court also analyzed whether petitioners could show that their injuries were caused by attacks initiated from airstrips within the GNPOC concession area and with GNPOC's assistance. The court held that only three petitioners were even "arguably" attacked with GNPOC's (not Talisman Energy's) assistance. Pet. App. B-91.

In ruling on Talisman Energy's motion for summary judgment, the District Court undertook an exhaustive review of the purported evidence petitioners submitted. Petitioners claim to have provided this Court with "[a] brief summary of the record . . . as context for the legal issues presented." Pet. 6. But as the District Court observed:

> the plaintiffs have not distinguished between the admissible and the inadmissible. The plaintiffs repeatedly described "'Talisman" as having done this or that, when the examination of the sources to which they refer reveals that it is some other entity or an employee of some other company that acted. They assert that this or that event

[2] The Second Circuit agreed with this conclusion. Pet. App. A-37-40

> happened, when the documents to which they refer consist of hearsay embedded in more hearsay. Indeed, most of the admissible evidence is either statements made by or to Talisman executives, and the plaintiffs' descriptions of their own injuries, with very little admissible evidence offered to build the links in the chain of causation between the defendant and those injuries.

Pet. App. B-7.

After analyzing all the evidence that petitioners produced, and applying the relevant legal standards, the District Court comprehensively addressed "an issue that applies to every civil lawsuit in this country as it nears trial," *i.e.*, "whether the plaintiffs have supplied sufficient admissible evidence to proceed to trial on their claims." Pet. App. B-8. The District Court's conclusion: "They have not." *Id.*

B. The Second Circuit Unanimously Affirms the District Court's Grant of Summary Judgment

After the District Court granted Talisman Energy's motion for entry of final judgment pursuant to Federal Rule of Civil Procedure 54(b)—a motion necessitated by the failure of co-defendant the Government of Sudan to appear in the action—petitioners appealed.

The Second Circuit unanimously affirmed. In a decision authored by Chief Judge Dennis Jacobs, the Court of Appeals held that "under the principles articulated by the United States Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the standard for imposing accessorial liability under the ATS must be drawn from international law." Pet. App.

A-3. The court then carefully explored international law sources—treaties, judicial decisions, and commentary, to name just a few—in order to divine the appropriate rubric. Based on that exhaustive study, the Second Circuit concluded that, to establish accessorial liability under the ATS, "a claimant must show that the defendant provided substantial assistance with the purpose of facilitating the alleged offenses." *Id.*

That was something the petitioners did not do. As the Second Circuit emphasized, "plaintiffs presented no evidence that the company acted with the purpose of harming civilians living in southern Sudan." *Id.* Because petitioners offered no evidence suggesting that Talisman Energy acted with the specific purpose of facilitating human rights abuses, the Court of Appeals affirmed.

Petitioners filed a timely petition for rehearing and rehearing en banc, which the Second Circuit denied.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

Although petitioners' Petition presents no cert-worthy issue and should therefore be denied, if this Court grants the Petition, it should likewise grant this Conditional Cross-Petition. That is because the Conditional Cross-Petition raises important threshold questions of subject matter jurisdiction under the ATS: whether corporations can be held liable under the Act and whether it extends extraterritorially to acts that have no connection to the United States. The lower courts—which continue to struggle with the scope of the ATS and its applicability to an ever-expanding species of claims—would

benefit from this Court's guidance on these recurring questions of national importance.

If liability under the ATS for violations of international law does not extend to corporations and/or if it is improper for United States courts to exercise extraterritorial jurisdiction in a manner contrary to international law over ATS disputes arising wholly outside the United States, this Court's so holding now will spare litigants and the courts from wasting resources on such cases and will, consistent with the underlying objectives of the ATS, minimize, rather than provoke, friction between the United States and its sister States.

I. CORPORATE LIABILITY FOR VIOLATIONS OF INTERNATIONAL LAW UNDER THE ATS IS A FUNDAMENTAL JURISDICTIONAL QUESTION.

Sosa did not address the question of corporate liability for alleged violations of customary international law asserted under the ATS; indeed, the case did not involve a corporation at all. But this Court held in *Sosa* that questions concerning the scope of liability under the ATS, including whether such liability extends to a particular defendant, are governed by international law. 542 U.S. at 732 n.20.

Uniform application of that rule has proven elusive in the lower federal courts. Underscoring the confusion that has divided those courts, the Second Circuit's decision in *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), produced three different and highly fractured opinions regarding corporate liability. Judge Katzmann opined that jurisdiction to hear a claim under the ATS depends on "whether the alleged tort was in fact committed in

violation of the law of nations . . . and whether *this* law would recognize the defendants' responsibility for that violation." *Id.* at 270 (emphasis added). He concluded, however, that "because the defendants have not objected to the imposition of liability on this basis, we need not reach the issue at this time." *Id.* at 283. Judge Hall concluded, with no apparent analysis, that corporate actors "are subject to liability under the ATCA." *Id.* at 289. Only Judge Korman fully considered the issue. In his partial dissent he concluded, after extensive analysis, that international law does not recognize corporate liability. *Id.* at 326.

In this case, a different panel of the Second Circuit properly construed *Sosa* to require resort to international law to address Talisman Energy's argument that ATS liability does not extend to corporations. The panel, however, declined to reach the question—as to which it requested and received post-argument briefing—of whether "corporations such as Talisman may be held liable for the violations of customary international law that plaintiffs allege." Pet. App. A-36. Instead, the court "assumed" that corporations may be liable in such cases "without deciding" the issue, stating: "Because we hold that plaintiffs' claims fail on other grounds, we need not reach, in this action, the question of 'whether international law extends the scope of liability' to corporations." *Id.* (quoting *Sosa*, 542 U.S. at 732 n.20).

More troubling still, a number of the federal courts of appeals have assumed, incorrectly, that such liability exists. *See, e.g., Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009); *Abdullahi v. Pfizer Inc.*, 562 F.3d 163 (2d Cir. 2009); *Abagninin v. AMVAC Chemical Corp.*, 545 F.3d 733 (9th Cir.

2008); *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008); *Khulumani v. Barclay Nat'l. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007); *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005); *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003). If this Court grants petitioners' Petition, the Conditional Cross-Petition should be granted so that this Court can clarify the limited scope and purpose of the ATS.

II. CORPORATE LIABILITY IS NOT RECOGNIZED IN INTERNATIONAL LAW.

Sosa holds that the jurisdiction of the federal courts to adjudicate claims under the ATS extends only to a narrow class of claims based on "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" of violation of safe conducts, infringement of the rights of ambassadors, and piracy. 542 U.S. at 725. *Sosa* requires not only that the substantive norm at issue be so grounded in international law, but also that the same rigorous analysis establishes that liability for the violation extends to "the perpetrator being sued." *Id.* at 732 n.20.

The question, then, is whether there is a consensus among States, demonstrable with all the certainty that *Sosa* requires, that liability for violations of customary international law extends to corporations. There plainly is not.

No international tribunal has ever held a corporation liable for violating customary international law. Indeed, no organizational charter ever granted such a tribunal jurisdiction to do so. To the contrary, those charters, over a period of more than five decades, have consistently limited the jurisdiction of the tribunals they created to *natural*, not corporate, persons.

The London Charter establishing the International Military Tribunal at Nuremberg authorized the tribunal to "try and punish persons who . . . whether acting as individuals or as members of organizations" committed certain crimes. London Charter, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, 288. It did not confer jurisdiction over claims asserted against organizations or juridical persons.

The jurisdiction of each of the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda likewise is limited by their respective organizational statutes to "natural persons." ICTY Statute, art. 6, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); ICTR Statute, art. 5, S.C. Res. 955, U.N. S/RES/955 (Nov. 8, 1994).

Nor are these charters outliers or relics of bygone eras. Most recently, the framers of the Rome Statute of the International Criminal Court, with 148 signatories, provided only for jurisdiction over "natural persons." The Rome Statute of the ICC art. 25(1), *opened for signature* July 17, 1998, 37 I.L.M 999, 1016 (entered into force July 1, 2002). The reason why the jurisdiction of the ICC is limited to natural persons is particularly telling in light of *Sosa*'s requirement of universal acceptance: there was no consensus among the nations involved in drafting the

Rome Statute that its reach should extend to corporations. France's proposal to confer on the ICC jurisdiction over corporations:

> was . . . rejected for three principal reasons: (1) "from a pragmatic point of view it was feared that the ICC would be faced with tremendous evidentiary problems when prosecuting legal entities"; (2) "from a more normative-political point of view it was emphasized that the criminal liability of corporations is still rejected in many national legal orders, and international disparity which could not be brought in concord with the principle of complementarity"; and (3) "it was felt morally obtuse for States to insist on the criminal responsibility of all entities other than themselves."

Khulumani, 504 F.3d at 322-23 (quoting Albin Eser, Individual Criminal Responsibility, in 1 Antonio Cassese, *et al.*, The Rome Statute of the International Criminal Court: A Commentary 767, 778-79 (Oxford Univ. Press 2002)).

Further evidence that international law does not recognize corporate liability can be found in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention"). The Torture Convention by its terms extends only to natural persons. *Khulumani*, 504 F.3d at 323. The U.S. Torture Victim Protection Act implementing the Torture Convention accordingly uses the term "individuals" to refer to those who are capable of violating the statute *and* those who have been subjected to torture, leading courts to conclude that the term "individuals" must refer solely to natural persons. *Id.*; *In re Agent Orange Product Liab. Litig.*, 373 F. Supp. 2d 7, 56 (E.D.N.Y. 2005).

Finally, because international law is gleaned from the "customs and usages of civilized nations," *The Paquete Habana*, 175 U.S. 677, 700 (1900), it is especially significant that a 28-country survey carried out on Talisman Energy's behalf in response to the Second Circuit's request for post-argument briefing on the subject of corporate liability for violations of international law revealed *not a single* judicial decision recognizing such liability. Petitioners could not point to any such decision either.

In sum, neither the practices of States, the various ad hoc international tribunals, nor the Rome Statute recognizes the liability of corporations for violations of customary international law. There is simply no basis consistent with *Sosa* for United States courts to recognize such liability.

III. THE EXTRATERRITORIAL APPLICATION OF THE ATS IS A FUNDAMENTAL JURISDICTIONAL QUESTION.

Although the issue was briefed in both cases, the Second Circuit did not address in this case or in *Khulumani* whether the federal courts have subject matter jurisdiction to adjudicate ATS claims asserted against foreign defendants for alleged conduct wholly outside the United States. If the ATS does not apply to such claims, then there is no federal subject matter jurisdiction to adjudicate them. Federal subject matter jurisdiction is equally lacking if adjudicating such a claim is in violation of international law or is inconsistent with *Sosa*'s admonition that courts must avoid creating new ATS causes of action without due regard to the practical consequences of so doing.

Like the issue of corporate liability under the ATS, these are fundamental jurisdictional questions lurk-

ing in many cases. This Court's defining the proper jurisdictional boundaries of the ATS might blunt the criticism of ATS litigation in the United States that has been voiced by foreign governments, including Canada (in this case) and the United Kingdom (which characterized the Apartheid action as one that "treats the Alien Tort Statute as a broad charter to extend United States jurisdiction beyond the limits well established and widely recognized under customary international law."). Brief for The United States as *Amicus Curiae* in Support of Petitioners, *American Isuzu Motors, Inc. v. Ntsebeza*, App. 3a-4a, 128 S.Ct. 2484 (Mem.) (2008) (No. 07-919).

IV. THE ATS DOES NOT APPLY TO ALLEGED TORTS IN VIOLATION OF INTERNATIONAL LAW COMMITTED IN THE SOVEREIGN TERRITORY OF ANOTHER STATE.

Whether Congress has sought to project its enactments beyond the territorial boundaries of the United States is a matter of statutory construction. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). The presumption against the extraterritoriality of Congressional acts requires that, unless a contrary legislative intent is clearly expressed, a legislative enactment be presumed primarily to be concerned with "domestic conditions." *Id.* (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 284-85 (1949)).

Nothing in the text of the ATS vests the federal courts with a roving commission to adjudicate violations of international law across the globe. Nor does the ATS's legislative history hint at such a radical jurisdictional grant. To the contrary, the historical origins of the ATS indicate that Congress's intent

was far more modest: to create a federal forum to adjudicate only such disputes arising in the United States, or perhaps also on the high seas where no one country can claim jurisdiction.

In *Sosa*, Justice Souter, writing for a majority of the Court, analyzed extensively the origins of the ATS. He explained that the "Continental Congress was hamstrung by its inability to 'cause infractions of treaties, or of the law of nations to be punished.'" *Sosa*, 542 U.S. at 716 (quoting J. Madison, Journal of the Constitutional Convention 60 (E. Scott ed. 1893)). Despite its efforts to encourage state legislatures to provide a judicial forum for suits to redress "injury done to a foreign power by a citizen," only a single state appears to have acted on the Continental Congress's recommendation. *Id.*

The need for a forum to address torts in violation of international law, and in particular transgressions upon foreign ambassadors in the United States, was highlighted by the Marbois incident. Marbois, a Secretary of the French Legion, was assaulted in Pennsylvania by another Frenchman, De Longchamps. *Id.* at 716. The French and the Dutch governments protested the incident, and Secretary Jay lamented that there was no federal forum in which to adjudicate the case. *Id.* at 717.

It is precisely that absence of a federal forum to address torts in violation of the law of nations that the First Congress sought to remedy in enacting the ATS. *Id.* The First Congress acted in response to a domestic incident in which the United States was seen by other States as having failed in its obligation to provide a forum to shape a remedy for a wrong committed on its soil. *Id.* at 716-17. There is no reason to believe that other nations would expect the

United States to provide a forum to redress an assault on a French ambassador if that assault occurred, for example, in Italy. Nor, therefore, is there any reason to believe that in enacting the ATS the First Congress intended to create a forum for a lawsuit involving such an assault, lacking as it does any nexus to the United States.

In light of this historical backdrop, there is no reason to suppose that the First Congress intended to vest the federal courts with subject matter jurisdiction to adjudicate torts in violation of the law of nations irrespective of where in the world those torts were committed. There certainly is no evidence of such an intent that is sufficient to overcome the presumption against extraterritoriality.

V. ADJUDICATING IN THE UNITED STATES ATS CLAIMS AGAINST FOREIGN DEFENDANTS ARISING FROM CONDUCT WHOLLY OUTSIDE THE UNITED STATES IS INCONSISTENT WITH INTERNATIONAL LAW AND *SOSA*.

It is axiomatic that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

The ATS is a jurisdictional statute, providing for federal subject matter jurisdiction only if the district court has the power to create a cause of action to adjudicate the alleged commission of what amounts to an international crime. *Sosa*, 542 U.S. at 724; *Khulumani*, 504 F.3d at 308-09 (Korman, J., concurring in part and dissenting in part) ("subject matter jurisdiction under the ATCA depends on whether the

defendants have violated an international law norm *which federal courts are prepared to recognize, accept and make available to litigants*") (emphasis in original). No such cause of action can properly be created, consistent with the *Charming Betsy* principle, if its adjudication would be inconsistent with international law.

In his concurring opinion in *Sosa*, Justice Breyer stated that in considering ATS cases courts must determine not only whether there exists among nations a consensus as to the substantive norms at issue and whether liability extends to a particular actor, but also a "procedural consensus" that the court has jurisdiction to adjudicate the dispute. 542 U.S. at 761-62 (concurring in part and concurring in the judgment). Questions about that procedural consensus arise most acutely in cases like this one where "foreign persons injured abroad bring suit in the United States under the ATS, asking the courts to recognize a claim that a certain kind of foreign conduct violates an international norm." *Id.* at 761.

International law recognizes the jurisdiction of States to regulate conduct pursuant only to certain principles legitimizing that power. The territoriality principle recognizes the authority of States to regulate conduct within a State's own territory. The nationality principle recognizes a State's authority to regulate the conduct of its own nationals. A State's regulation of conduct directed against the security of that State is consistent with the protective principle. Restatement (Third) of the Foreign Relations Law of the United States § 402 (1986).

The authority of a United States court to punish foreign defendants by imposing an adverse judgment in an ATS case for conduct occurring exclusively

outside the United States is not grounded in any of these principles. Nor could such a case, commenced as it must be by an "alien," properly invoke the passive personality principle, in accord with which States are permitted to exercise jurisdiction to redress wrongs committed against their nationals. *Id.*

Each of these principles is one that establishes a genuine link between the State exercising prescriptive jurisdiction and the underlying conduct at issue. International law requires that such a link exist to legitimize a State's exercise of jurisdiction. *See* John H. Currie, *Public International Law* 308 (2001) ("state practice discloses . . . the requirement of a genuine and effective link justifying the extension of a state's prescriptive jurisdiction to any particular person or transaction"); *see also F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) (only proper to apply U.S. antitrust laws to foreign conduct to address domestic antitrust injury).

There is some support for the contention that international law recognizes the authority of States to exercise universal *criminal* jurisdiction over individuals to adjudicate a small subset of grave international law violations, including genocide, torture, and war crimes. Restatement (Third) of the Foreign Relations Law of the United States § 404 (1986). The underlying principle supporting universal criminal jurisdiction is to assure that there is an available forum to punish conduct violating the most fundamental norms of international law.

However, international law does not recognize any kind of "universal civil jurisdiction," and generally only recognizes the assertion of civil jurisdiction under circumstances that are reasonable. *Id.* at § 421(1). The assertion of civil jurisdiction to adjudi-

cate causes of action for violations of international law could only be universally accepted as reasonable under international law if, at the very least, it is asserted under circumstances that do not exceed the jurisdictional limits associated with universal criminal jurisdiction. Several such limits are important to the facts of this case:

1. There is no consensus among States that universal jurisdiction extends to aiding and abetting the commission of violations of even those international law norms over which States are expected to exercise universal criminal jurisdiction;

2. Where there is a State willing and able to exercise jurisdiction resting on one or more of the traditional jurisdictional bases (*e.g.*, the territoriality principle or the nationality principle), there is no basis for another State lacking such traditional jurisdictional bases to assert universal jurisdiction; and

3. The proper exercise of universal jurisdiction requires that the adjudicating State have custody of the accused.

Talisman Energy is not alleged to have committed genocide, war crimes, or crimes against humanity. With respect to the allegation that Talisman Energy aided and abetted their commission, the application of the first point to this case is plain.

As to the second point, Talisman Energy is a Canadian corporation subject to suit in Canada. The courts there could exercise jurisdiction to redress petitioners' claims consistent with international law based on the nationality principle. Consequently, there is no basis for a United States court to exercise universal jurisdiction in this case. And it offends the sovereignty of other States for a court in the United

States to sit in judgment over their citizens and corporations for acts having no connection to the United States.

The requirement that a State exercising universal jurisdiction have custody of the accused also was not met in this case. The District Court held that Talisman Energy was subject to its personal jurisdiction because the court pierced the corporate veil separating Talisman Energy from its subsidiary Fortuna Energy Inc., and attributed Fortuna Energy's New York contacts to Talisman Energy. The District Court went on to hold that those combined forum contacts were sufficient to support personal jurisdiction over Talisman Energy. There is no international consensus equating the concept of physical custody of a person with personal jurisdiction over a corporation based on its minimum contacts with a forum established by way of a state-law-specific veil piercing analysis. *See* Restatement (Third) of the Foreign Relations Law of the United States § 421(2)(c) (1986) (exercise of jurisdiction over a corporation is reasonable if corporation is organized pursuant to the laws of the State). In sum, even if the concept of universal civil jurisdiction were so well established in international law as to meet *Sosa*'s stringent test—and it is not—in this case there was no basis in international law for the District Court to exercise such jurisdiction.

Finally, *Sosa* erected a "high bar to new private causes of action for violating international law, for the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary." 542 U.S. at 727. In this case, the Court need not speculate as to the *potential* implications for the foreign relations of the

United States associated with creating an ATS cause of action. In its amicus brief to the Second Circuit, the Government of Canada made several key arguments that make the *actual* foreign relations implications clear:

- "[a]pplying the ATS to Talisman on the facts presented below would violate th[e] fundamental principle of customary international law" that "requires a genuine and effective link between the nation seeking to assert jurisdiction and the persons or activities it seeks to regulate";
- adjudicating this case "fails to recognize the impact on Canada's important foreign policy as counseled by . . . *Sosa*"; and
- the "overly broad assertion of extraterritorial jurisdiction creates friction in Canada-United States relations."

Brief for The Government of Canada in Support of Dismissal of the Underlying Action, *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2d Cir. 2009) (07-0016-CV).

Because (i) the ATS does not apply to torts arising outside the United States; (ii) there was no basis consistent with international law to assert jurisdiction over the claims asserted; and (iii) the adverse practical consequences associated with adjudicating those claims are serious and apparent, the District Court lacked any basis to create a cause of action under the ATS. It therefore lacked subject matter jurisdiction over this dispute.

CONCLUSION

For the reasons set forth above, if the Court grants petitioners' Petition for a Writ of Certiorari, it should also grant this Conditional Cross-Petition for a Writ of Certiorari.

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IN THE

Supreme Court of the United States

TALISMAN ENERGY, INC.,
Petitioner,
vs.
THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A, FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KUEIGWONG RAT, LUKA AYUOL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG, on behalf of themselves and all others similarly situated,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS

All parties or respondents are listed in the caption and are individuals.

RULE 29.6 STATEMENT

None of the respondents is a nongovernmental corporation. None of the respondents has a parent corporation or shares held by a publicly traded company.

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STATEMENT OF THE CASE

Talisman Energy, Inc. ("Talisman") makes no serious attempt to oppose Plaintiffs' Petition for a Writ of Certiorari ("Petition" or "Cert. Pet."). The issues raised in Plaintiffs' Petition concerning aiding and abetting and conspiracy liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, are the central issues dividing lower courts in ATS cases.

Talisman's Conditional Cross-Petition for a Writ of Certiorari ("Cross-Petition") asks this Court to review whether the ATS applies to corporations or to human rights violations occurring outside the territory of the United States. There is no basis for review of these issues in this Court because there is no split of authority on these issues. Indeed, not a single case decided under the ATS before or after this Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), supports Talisman's position on either issue.

No court has found that corporations are exempt from tort liability or that they are not proper defendants under the ATS. The Court of Appeals explicitly declined to address this issue in this case. (Cert. Pet. App. 36 n. 12). To the contrary, there have been dozens of ATS claims against corporations and not a single one has been dismissed on the ground that corporations are in principle exempt from jurisdiction under the ATS.

Moreover, almost every ATS case since *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980),

including the cases specifically endorsed in *Sosa*, 542 U.S. at 725, and *Sosa* itself, involved extraterritorial human rights violations occurring on the territory of a foreign sovereign. There is nothing in the language, history, or jurisprudence of the ATS which supports Talisman's request for judicial amendment of the statute. Talisman's arguments on these issues are more properly addressed to Congress.

Talisman's Statement of the Case in its Conditional Cross-Petition raises numerous issues that were litigated below and challenged by Plaintiffs below but were not decided by the Court of Appeals. Talisman does not and cannot challenge the fact that the Court of Appeals' holding, that Plaintiffs had to produce evidence of Talisman's "purpose," was *the* dispositive ruling. (Cert. Pet. App. A30-32). If this erroneous ruling is reversed by this Court, as requested in Plaintiffs' Petition, the Court of Appeals would be required to consider all of Plaintiffs' other challenges, including the sufficiency of the evidence under the proper legal standard.

For example, at no point have Plaintiffs waived their genocide claims, as Talisman argues in its Cross-Petition. Plaintiffs introduced evidence that Talisman was aware of the ongoing genocidal acts committed in the oil fields on behalf of its joint venture with the Government of Sudan ("GOS") and advanced the conspiracy to commit genocide claim throughout this action. (Appellants' Opening Brief "AOB" 57-61, 78). The Court of Appeals specifically addressed Plaintiffs' genocide claims (Cert. Pet. App. A32-33) but found that federal common law did not

apply and Plaintiffs had not satisfied the "essential" elements for conspiracy in international law. Plaintiffs have challenged this decision in their Petition.

Moreover, many of the specific points made by Talisman about the sufficiency of the evidence are inextricably linked to the Court of Appeals' erroneous legal analysis, holding that Plaintiffs had to prove "purpose" to succeed on their aiding and abetting and conspiracy claims. For example, Talisman asserts that the district court found no admissible evidence that Talisman Energy "specifically directed" payments of royalties to be used for military procurement by the GOS. (Cross-Pet. 5). However, the district court erred precisely because it viewed the evidence of substantial assistance through the lens of its "purpose" standard. "The connection between the payment of royalties and the Government attacks on civilians is simply too indirect to permit the payment of royalties itself to serve as circumstantial evidence of an *intent* to assist in the Government's commission of war crimes and crimes against humanity." (Pet. Cert. App. 88) (emphasis added). The Court of Appeals also weighed the evidence only to determine whether it supported a showing of "purpose." "[T]here is no evidence that GNPOC or Talisman acted with the *purpose* that the royalty payments be used for human rights abuses." (Pet. Cert. App. 38) (emphasis added). There is, however, ample evidence that Talisman made royalty payments *knowing* that the government would use oil revenues to finance the acquisition of advanced military hardware, such as the helicopter

gunships that conducted operations in the oil fields in violation of international law. (AOB 25-28).

Talisman states that both lower courts found that Plaintiffs failed to introduce adequate admissible evidence of Talisman's "purpose." Plaintiffs did introduce abundant evidence of Talisman's direct involvement in human rights violations and its intent to support and further the joint venture despite knowledge of the ongoing violations. The issue, thus, is not one of lack of evidence, as Talisman now asserts, but the erroneous legal standard employed by the Court of Appeals and its impact on the Court of Appeals' evaluation of the evidence presented.

Significantly, Talisman's strategic recharacterizations of the decisions below do not challenge Plaintiffs' primary point in their Petition namely that all of the issues not decided by the Second Circuit would have to be revisited if this Court agrees that the wrong standard was employed.

REASONS FOR DENYING CONDITIONAL CROSS-PETITION

This Court should deny Talisman's Conditional Cross-Petition on the issues of corporate liability and extraterritoriality. There is no conflict in authority on these issues and there is no case supporting Talisman's position on either issue. Corporations have been subject to suit under the ATS in dozens of cases and virtually every ATS case has involved extraterritorial acts. Congress has not decided to

limit ATS jurisdiction to claims against natural persons or solely to acts committed within United States territory. Nothing in the language, history or purpose of the ATS, or in this Court's *Sosa* decision, provides any exemption for corporations or limits the scope of the ATS to acts committed on the territory of the United States.

I. REVIEW OF THE ISSUE OF CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE IS INAPPROPRIATE IN THE ABSENCE OF ANY SPLIT IN THE CIRCUITS OR ANY OTHER CONFLICT OF AUTHORITY.

A. Corporate Liability is Not an Issue of Subject Matter Jurisdiction.

This Court need not resolve the issues raised in the Conditional Cross-Petition before reaching the issues raised in Plaintiffs' Petition. Plaintiffs have met all prerequisites for subject matter jurisdiction under the ATS. This case is brought (1) by aliens, (2) for torts, (3) committed in violation of the law of nations. There is no dispute that the violations alleged by Plaintiffs — genocide, war crimes and crimes against humanity — are actionable under *Sosa*.

Moreover, no court has ever found that the ATS precludes claims against corporations. *See* § (I)(D), *infra*. Thus, there is no question that the Court of Appeals had the jurisdiction to decide this case on the grounds it did. *See Steel Co. v. Citizens*

for a Better Env't, 523 U.S. 83 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional power to adjudicate the case.").[1] Talisman did make the argument about the absence of corporate liability below;[2] however, this Court is not required to address this argument before it addresses the issues raised in Plaintiffs' Petition.

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[1] *See also, Bell v. Hood*, 327 U.S. 678, 682 (1946) (finding the district court has jurisdiction when "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another" . . . except when the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."). *See generally* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure § 1350*, at 196 n.8 (2d ed. 1990) (citing cases).

[2] The district court's reasoning in denying Talisman's argument is persuasive. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp 2d 289, 308–09 (S.D.N.Y. 2003). *See also, Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp 2d 331, 335 (S.D.N.Y. 2005) (reaffirming decision).

B. This Court Did Not Hold That All Issues in ATS Cases Were Governed by International Law in Footnote 20 in *Sosa*.

Talisman's corporate exemption argument rests on a fundamental misinterpretation of this Court's footnote 20 in *Sosa*. *Sosa* did not involve any issues relating to corporations or to the choice of law governing the appropriate defendants in ATS cases. In fact, footnote 20 explicitly contemplated corporate liability under the ATS.[3] Note 20 addressed the issue of which international norms apply directly to non-state actors, including corporations,[4] as distinct from

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[3] Footnote 20 reads in full: "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–95 (D.C. Cir. 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karadzic*, 70 F.3d 232, 239–241 (2d Cir. 1995) (sufficient consensus in 1995 that genocide by private actors violates international law)." 542 U.S. at 733. The district court rejected Talisman's reading of footnote 20 in the course of its rejection of its corporate liability argument below. *Talisman*, 374 F. Supp. 2d at 335-36.

[4] *See, e.g.*, Chimène Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 Hastings L.J. 61, 72 (2008). ("By grouping 'corporations and individuals' together as private actors, the statement can be read as

those norms which require a showing of state action. This Court did not hold in note 20, or elsewhere in *Sosa*, that international law governs all issues regarding the scope of liability in ATS cases. For the reasons set forth in Plaintiffs' Petition, federal common law should apply to all issues other than the "law of nations" violations that provide the courts with the authority to enforce federal common law tort remedies. At a minimum, though, *Sosa* does not hold that international law determines whether corporations are subject to ATS liability and Talisman's attempt to use *Sosa* as the justification for review in this Court should fail.

C. There is Nothing in the History, Language, or Purpose of the ATS That Provides An Exemption From ATS Liability For Corporations.

The plain language and history of the ATS rebut Talisman's request for a special exemption from ATS liability for corporate defendants. A blanket exclusion for corporate actors would also conflict with the fundamental remedial purpose of the statute.

The original wording of the ATS granted the district courts "cognizance . . . of *all causes* where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." An Act to

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affirming the potential liability of corporations alongside private individuals under the ATS.").

Establish the Judicial Courts of the United States ("Judiciary Act"), ch. 20, § 9, 1 Stat. 73, 77 (1789) (emphasis added). This formulation refutes any implication that non-natural private actors, such as corporations, were excluded from ATS liability by the first Congress.[5] It is evident from the text that Congress was focused not on the identity of the defendant but rather on the right that had been violated (a right under "the law of nations or a treaty of the United States") and the identity of the plaintiff ("an alien"). *Id.* Congress has never acted to restrict the universe of ATS defendants since the law's enactment in 1789.

The inability of the national government to remedy violations of the law of nations was a major concern of American leaders in the years leading up to passage of the ATS. *See Sosa*, 542 U.S. at 715-18. James Madison complained that the Articles of Confederation "contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations." The Federalist No. 42, at 264-65 (James Madison) (Clinton Rossiter ed., 1961).

In 1781, the Continental Congress passed a resolution recommending to the States that they "provide expeditious, exemplary and adequate

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[5] *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) ("The Alien Tort Statute by its terms does not distinguish among classes of defendants. . .").

punishment" for violations of the law of nations and treaties to which the United States was a party. 21 Journals of the Continental Congress 1774-1789, at 1136-37 (G. Hunt ed., 1912).[6] As this Court recognized in *Sosa*, Congress intended the ATS to provide tort remedies in addition to criminal penalties provided for elsewhere. 542 U.S. at 716.

The purpose of the ATS was to provide redress in the federal courts for aliens who had suffered a violation of their rights under international law. Because "torts in violation of the law of nations would have been recognized within the common law of the time," *Sosa*, 542 U.S. at 714, these actions could have been brought in state courts of general jurisdiction. *See id.* at 721–22 (rejecting the argument that the 1781 resolution showed that such torts were not actionable in state courts). Indeed, the ATS specified that the district courts' jurisdiction over these torts would be "concurrent with the courts of the several States." Judiciary Act, ch. 20, § 9, 1 Stat. at 77. For the First Congress, however, the availability of a federal remedy was crucial. *See generally* Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am.

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[6] These provisions from Congress's 1781 resolution are acknowledged to be the direct precursors of the ATS. *See* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 490-91 (1986); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l & Comp. L. Rev. 221, 226-28 (1996).

J. Int'l L., 461, 481–88 (1989). In addition to shielding aliens from hostility in state courts,[7] the availability of a federal forum for international claims promoted uniformity of interpretation of the law of nations.[8] Exclusion of corporations from the scope of ATS liability, even where corporations aid or abet human rights violations actionable under the ATS, is at odds with all of these purposes.

The history of the ATS shows that, as early as the 18th century, the liability of non-natural persons under the act had been contemplated. It was clear to Attorney General William Bradford in 1795 that foreign companies could bring suits under the ATS. In an opinion arising from an attack off the coast of Sierra Leone (a breach of neutrality), Bradford found that "there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States. . . ." 1 *Op. Att'y Gen.* 57, 59 (1795). Bradford saw no issue in the ability of a company bringing an ATS claim. There is no basis in text,

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[7] *See generally* Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 Duke L.J. 1421, 1440-53.

[8] *See* The Federalist No. 3, 41, 43 (John Jay) (Clinton Rossiter ed., 1961) ("Under the national government, treaties . . . as well as the laws of nations, will always be expounded in one sense . . . whereas, adjudications on the same points and questions in thirteen States . . . will not always accord or be consistent . . . .").

history, principle, or precedent to believe that a company involved in the same attack would not similarly have been an appropriate ATS defendant.[9]

Attorney General Bradford's conclusion is not surprising given the fact that corporations and other non-natural persons were understood to be susceptible to tort liability at the time the ATS was enacted. Corporations would have been assumed to be proper defendants in an ATS case under the tort principles of the era.

Moreover, tort liability for maritime claims, which were and are part of the law of nations, predates the founding of our Nation. *See* Federalist No. 80, n. 61 (Hamilton). The history of federal court jurisdiction over maritime torts, including violations of the law of nations, was compiled by Justice Story in *De Lovio v. Boit*, 7 F. Cas. 418 (1815), and more recently by this Court in *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2611 (2008), which held that maritime tort remedies against a corporation include punitive damages. This history demonstrates that maritime law was part of the law of nations adopted as federal law at the time of the Republic's founding

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[9] In 1907, Attorney General Charles Bonaparte found that an American corporation could be sued under the ATS for a tort in violation of a treaty of the United States. *See* 26 *Op. Att'y Gen.* 250, 252 – 53 (1907). Nothing in the treaty provided for private rights or liabilities but the Attorney General found that the ATS applied to a corporate defendant.

and that personal and corporate or company liability was routine. There is no basis to find that the Founders would have intended or expected an implicit exemption from liability under the ATS for corporations because they understood that transnational tort liability, for maritime and other torts, was routinely directed at private actors, including corporations.

The *Bolchos* case is further evidence the drafters of the ATS would have drawn no distinction between individual and corporate defendants for the purposes of that liability under the ATS. In *Bolchos v. Darrel*, 3 F. Cas. 810 (D.C.S.C. 1795), the defendant, an individual acting as agent for a British mortgagee, had seized and sold slaves which properly belonged to a French privateer, under the terms of a treaty with France. *Id.* The court found jurisdiction under the ATS based on the violation of that treaty. *Id.* at 810. Although Darrel, the agent in *Bolchos*, was an individual, there is nothing in *Bolchos* to suggest that had the mortgagee been a corporate entity there would be no liability under the ATS. The court engaged in no analysis suggesting that ATS jurisdiction was limited to natural persons.

Again in the 19th century, legal actions for violations of the law of nations applied to non-natural persons. In 1819, Congress provided for the forfeiture of ships engaged in "piratical aggression." Act of March 3, 1819, ch. 77, § 2, 3 Stat. 510, 512–13, continued by Act of May 15, 1820, ch. 113, § 1, 3 Stat. 600, 600. As Justice Story noted in *The Marianna Flora*, "piratical aggression by an armed vessel

sailing under the regular flag of any nation, may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations." 24 U.S. 1, 40-41 (1825). Such forfeiture proceedings were brought *in rem* against the ship itself. In *The Palmyra*, Justice Story rejected the argument that criminal proceedings against the captain or crew were a necessary precondition to the proceedings against the ship. 25 U.S. 1, 14 (1827).[10]

In sum, the weight of the textual and historical evidence suggests that the First Congress would have considered non-natural private actors, including corporations to be proper defendants under the ATS. There is nothing in the text, history or purpose of the ATS that supports the argument that an ATS plaintiff must show an affirmative right to bring a

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[10] Not only could legal actions for violations of the law of nations be brought against things like ships, they could be brought irrespective of the innocence of those things' owners. "It is not an uncommon course in the admiralty, acting under the law of nations," Justice Story explained, "to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof." *The Malek Adhel*, 43 U.S. 210, 233 (1844). *See also The Little Charles*, 26 F. Cas. 979 (1818) (No. 15,612) (Marshall, C.J.) ("But this is not a proceeding against the owner; it is a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner.").

tort claim against a corporation under international law.

D. No Court Has Ever Held That the ATS Does Not Apply to Corporations in the Same Manner as Any Other Tort Defendant.

The language of the ATS makes no distinction between natural and non-natural defendants, and courts have drawn no distinction between corporations and any other defendants in ATS cases. Thus, it is not surprising, in light of the language, history and purpose of the ATS, all ATS cases pre-*Sosa*[11] and post-*Sosa*[12] have allowed claims against

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[11] *See, e.g., Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192 (D.C. Cir. 2004); *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004); *Flores v. Peru Copper Corp.*, 406 F.3d 65 (2d Cir. 2003); *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003); *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated on other grounds*, 403 F.3d 708 (9th Cir. 2005); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *Carmichael v. United Techs. Corp.*, 835 F.2d 109 (5th Cir. 1988); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984); *Burnett v. Al Baraka Inv. and Dev. Corp.*, 274 F. Supp. 2d 86 (D.D.C. 2003); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078

corporate defendants to proceed under the ATS. Courts have drawn no distinction between corporations and any other defendant. Indeed, for more than fifteen years,[13] ATS litigation against corporate defendants has been ongoing without a single decision rejecting the applicability of the ATS to corporations or any Congressional action to alter

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(S.D. Fla. 1997).

[12] *See, e.g., Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303 (11th Cir. 2008); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008); *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005); *In re XE Services Alien Tort Litig.*, 665 F. Supp. 2d 569 (E.D.Va. 2009); *Estate of Abtan v. Blackwater Lodge & Training Ctr.*, 611 F. Supp. 2d 1 (D.D.C. 2009); *Linde v. Arab Bank, PLC*, 262 F.R.D. 136 (E.D.N.Y. 2009); *Chowdhury v. WorldTel Bangl. Holding, Ltd.*, 588 F. Supp. 2d 375 (E.D.N.Y. 2008); *Licea v. Curacao Drydock Co., Inc.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080 (N.D. Cal. 2008); *John Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988 (S.D. Ind. 2007); *Arias v. Dyncorp*, 517 F. Supp. 2d 221 (D.D.C. 2007); *In re Agent Orange Product Liability Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005); *Weiss v. Am. Jewish Comm.*, 335 F. Supp. 2d 469 (S.D.N.Y. 2004).

[13] The courts have allowed ATS claims against other non-natural defendants to proceed for even longer. *See, e.g., Tel Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (defendants included the PLO); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998).

the ATS or circumscribe such litigation. Talisman's argument is merely the latest attempt to obtain a judicial repeal of the ATS, in this case a selective repeal for corporations. However, Congress has taken no steps to restrict the ATS in response to *Filartiga* and its progeny, including dozens of cases alleging corporate complicity in human rights violations.

Requiring international law to supply the answers to questions like this one would render the ATS a dead letter. This Court explicitly rejected this outcome in *Sosa*, 542 U.S. at 724, 731, and cited Judge Edwards opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–95 (D.C. Cir. 1984) (Edwards, J. concurring), for the proposition that international law does *not* specify the domestic means for its enforcement. It was, and is, up to Congress to decide to exclude corporations from tort liability for complicity in egregious human rights violations such as the violations alleged by Plaintiffs in this case.

E. The ATS is Not in Conflict With International Law.

International law allows states to enforce their international obligations, or indeed to take action beyond their obligations, so long as such actions are not prohibited by international law. *See The Case of the S.S. "Lotus" (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 at 18-19 (Sept. 7). With the ATS, the first Congress decided to implement its obligation to provide a forum for adjudication of law

of nations violations by means of tort liability. Nothing in international law, then or since, prohibits that choice by Congress.

Corporate tort liability is in keeping with general principles of law which provide for corporate civil liability wrongs like these in all legal systems. *See* Brief of *Amicus Curiae* International Law Professors in Support of Plaintiffs-Appellees, *Balintulo v. Daimler AG*, 09-2778-CV, at 14-19 (December 22, 2009) (appeal pending) ("*Balintulo Amicus* Brief") (surveying corporate liability regimes in the United Kingdom, India, Australia, Canada, South Africa, the United States, Belgium, France, Israel, the Netherlands, Norway, Colombia, China, Thailand, Japan, Switzerland, Brazil, Indonesia, Italy, Germany, Spain, and Russia and finding "no jurisdiction that lacks the legal means of holding juridical persons accountable for their actions."). Thus, there is nothing unusual about imposing civil tort liability on corporations. It is a feature of all legal systems.[14]

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[14] *See* Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 390 (1953) (noting that general principles encompass "the fundamental principles of every legal system" and that they "belong to no particular system of law but are common to them all."). *Amici* International Law Professors accordingly found that "[b]ecause corporate liability for serious harms is a universal feature of the world's legal systems, it qualifies as a general principle of law." *Balintulo Amicus* Brief, at 14.

Talisman's citation to international fora where corporations have been excluded from particular international criminal regimes is irrelevant to the issue of corporate tort liability under the ATS. The Rome Statute creating the International Criminal Court and the Statutes of the Ad Hoc Tribunals for the Former Yugoslavia and Rwanda do not extend criminal liability to non-natural persons.[15] This was a choice made by the parties creating those criminal remedial fora and is not based on any international law prohibition on corporate criminal or civil liability. Indeed, these international agreements do not preclude corporate criminal liability for the same crimes in domestic legal systems which provide for such liability.[16]

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[15] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, art. 6 May 25, 1993, 32 I.L.M. 1192. Statute of the International Tribunal for Rwanda, art. 5, Nov. 8, 1994, 33 I.L.M. 1598, 1600. Rome Statute of the International Criminal Court, art. 25(1), opened for ratification July 17, 1998, 2187 U.N.T.S. 90.

[16] The International Scholars *Amicus* Brief in *Balintulo* includes a survey of state practice in which a substantial number of states provide for corporate criminal liability and all provide for some form of corporate tort liability. Now that the Second Circuit has indicated an interest in the issue of corporate ATS liability, Cert. Pet. App. A 36 n. 12, it is likely that a great deal of scholarly work will be done to respond to that interest. If a circuit split emerges, this Court would

Unlike foreign sovereign immunity or diplomatic immunity, there is absolutely *no* basis in international law for Talisman's claim that corporations are shielded from civil tort liability by any treaty or principle of customary law. To the extent international law supplies a defense to corporate liability in these circumstances, Talisman would be able to raise such a defense on remand. Talisman has made no showing that such a defense exists.

II. THE ISSUE OF THE EXTRATERRITORIAL APPLICATION OF THE ATS DOES NOT WARRANT REVIEW IN THIS COURT.

A. Extraterritoriality Is Not an Issue of Subject Matter Jurisdiction.

As set forth in § (I)(A), *supra*, all the explicit statutory prerequisites for subject matter jurisdiction under the ATS have been met in this case. No case has ever questioned the extraterritorial application of the ATS. Indeed, *Sosa* involved the application of the ATS to extraterritorial violations. This Court is not required to reach this issue to determine the issues in Plaintiffs' Petition.

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have the benefit of that scholarly work after more lower courts have actually addressed this issue on the merits.

B. The Language and History of the ATS Clearly Establish That it Was Meant to Apply Extraterritorially.

On its face, the ATS has no territorial limit. The First Continental Congress knew how to limit the application of laws within the Judiciary Act to the borders of the United States.[17] *See Judiciary Act*, ch. 20, §9, 1 Stat. 73, 76-77 (1789) ("The district courts shall have . . . cognizance of all crimes and offenses that shall be cognizable under the authority of the United States, *committed within their respective districts, or upon the high seas.*") (emphasis added). While Congress chose to limit the reach of the Act in relation to *crimes* in some respects, it did not choose limiting language for civil claims under the ATS. *Id.* at 77. There is no evidence, whatsoever, of any Congressional intent to limit the ATS to violations occurring within the U.S. territory.

The history of the ATS establishes that the statute was meant to apply extraterritorially. Piracy was invariably extraterritorial. *See U.S. v. Smith*, 18 U.S. 153 (1820).[18] This Court has long held that the

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[17] *See* Brief of Professors of Federal Jurisdiction and Legal History as *Amici Curiae* in Support of Respondents at 23, *Sosa*, 452 U.S. 692 (2004) (No. 03-339).

[18] *See, e.g.*, United Nations Convention on the Law of the Sea, art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397 (piracy consists of acts occurring on the "high seas" or

presumption against extraterritoriality applies to offenses occurring on the high seas.[19] In *Sosa*, this Court affirmed that the First Continental Congress intended for the ATS to apply to piracy. 542 U.S. at 719. This alone negates any argument that Congress intended the ATS to be limited to United States territory.

The 1795 Bradford opinion confirms that the ATS was meant to apply to extraterritorial violations of the law of nations. The opinion was issued in relation to American citizens who had aided and abetted a French fleet in attacking a British settlement in Sierra Leone, an action occurring entirely outside of the United States and within the territory of a foreign sovereign. 1 *U.S. Op. Atty. Gen.* 57 (1795); *Sosa*, 542 U.S. at 721. There is no indication whatsoever in the Bradford opinion that the ATS did not apply to law of nations violations committed within the sovereign territory of another country.

"outside the jurisdiction of any State").

[19] *See Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1808) ("The rights of war may be exercised on the high seas, because war is carried upon the high seas; but the pacific rights of sovereignty must be exercised within the territory of the sovereign"); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989) ("When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute").

Furthermore, the drafters of the ATS understood that torts were transitory permitting plaintiffs to bring tort claims wherever the tortfeasor could be found. *See McKenna v. Fisk*, 42 U.S. 241, 248 (1843) ("[T]here is not a colour of doubt but that any action which is transitory may be laid in any county in England, though the matter arises beyond the seas.") (quoting Lord Mansfield in *Mostyn v. Fabrigas*, 1 Cowp. 161 (K.B. 1774)).[20]

The First Congress, through the ATS, provided a federal forum for transitory torts involving a violation of the law of nations. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964) (noting that the ATS was passed to ensure that "matters of international significance" were adjudicated by federal courts). In sum, the language and history of the ATS demonstrates Congress' intent for the statute to apply extraterritorially. *See EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (declaring that the presumption against extraterritoriality is inapplicable where contrary intent is clear).

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[20] *See also*, Restatement (Second) of Foreign Relations Law of the United States § 19 (1965); *Stoddard v. Bird*, 1 Kirby 65 (Conn. 1786) (Ellsworth, J.) (holding that the action of false imprisonment was transitory, permitting the action to be brought wherever the defendant was found); *Filartiga*, 630 F.2d at 855 ("It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction.") (citing to *McKenna*); *Dennick v. R.R. Co.*, 103 U.S. 11 (1880) (wrongful death action held transitory).

C. *Sosa* Confirms That the ATS Applies to Extraterritorial Human Rights Violations.

Talisman's argument is inconsistent with *Sosa*. First, all of the events at issue in *Sosa* were extraterritorial. Second, this Court affirmed a long list of cases based upon actions taking place within the territory of foreign sovereigns.

First, in *Sosa* itself all of the challenged actions took place within Mexican territory. 542 U.S. at 698 (noting the abduction and arbitrary detention in question occurred entirely in Mexico). Defendant Sosa was one of six Mexican nationals who kidnapped Dr. Alvarez-Machain and held him for less than twenty-four hours in Mexico before delivering him to DEA officials in El Paso, Texas. *Id.* By the time the case got to this Court, all claims based on events taking place in U.S. territory had been dismissed.[21] Thus, if the ATS did not apply to actions taking place outside U.S. territory or within a foreign sovereign's territory, this Court would have lacked subject matter jurisdiction. 542 U.S. at 731-34. This Court ruled on the merits of Dr. Alvarez-Machain's claims despite the fact that the United

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[21] *See Alvarez-Machain v. United States*, 331 F.3d 604, 636-37 (9th Cir. 2003) (noting that the tortious activity in question occurred almost solely within the confines of Mexico) (citing *United States v. Alvarez-Machain*, 504 U.S. 655, 669-70); *see also Sosa*, 542 U.S. at 753 (Ginsburg, J., concurring) ("[n]o tortious act occurred once Alvarez was within United States borders . . .").

States advanced the same extraterritoriality argument Talisman advances here.[22]

Sosa also explicitly affirmed a long line of precedent applying the ATS to cases brought to redress extraterritorial human rights violations. *See Sosa*, 542 U.S. at 730-33. Among the cases affirmed as consistent with the holding in *Sosa* was the seminal case in modern ATS litigation, *Filartiga v. Pena-Irala*, which found that jurisdiction existed even for torture that had been committed wholly in Paraguay, by a Paraguayan national and against a Paraguayan citizen. *See Id.* at 725, 732, *citing Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). *Sosa* also affirmed *In re Estate of Marcos*, where the district court held that jurisdiction was proper in a case involving claims by Philippine nationals that former Philippine President Marcos was responsible for torture, extra-judicial executions and disappearances committed exclusively on Philippine territory. *Id., citing Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994).

In finding that claims under the ATS must be violations of well-established international human rights norms, this Court noted that its reasoning was "generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court." *Sosa*, 542 U.S. at 732. In fact,

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[22] *Br. for U.S.* 48-50, *Sosa*, 452 U.S. 692 (2004) (No. 03-339).

no pre-*Sosa*[23] or post-*Sosa*[24] court has ever held, or

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[23] *See, e.g.*, *Flores v. Peru Copper Co.*, 414 F.3d 233 (2d Cir. 2003) (claims arising in Peru); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (claims arising in Nigeria); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 164-65 (5th Cir. 1999) (claims arising in Indonesia); *Abebe-Jira v. Negewo*, 72 F.3d 844, 846-48 (11th Cir. 1996) (claims arising in Ethiopia); *Kadic v. Karadzic*, 70 F.3d 232, 238-45 (2d Cir. 1995) (claims arising in Bosnia); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y., 2000) (claims arising from the Holocaust and against a French corporation); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 446 (D.N.J. 1999) (claims arising in Germany); *Eastman Kodak Co. v. Kalvin*, 978 F. Supp 1078, 1094 (S.D. Fla. 1997) (claims arising in Bolivia); *Doe I v. Unocal Corp.*, 963 F. Supp. 880, 992 (C.D. Cal. 1997) (claims arising in Burma).

[24] *See, e.g.*, *Chavez v. Carranza*, 559 F.3d 486, 490 (6th Cir 2009), cert. denied, 130 S.Ct. 110 (2009) (claims arising in El Salvador); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1257 (11th Cir. 2009) (claims arising in Colombia); *Abdullahi v. Pfizer*, 562 F.3d 163, 175-80 (2d Cir. 2009) (claims arising in Nigeria); *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009) (claims arising in Somalia) *aff'd*, 2010 WL 2160785, No. 08-1555; ; *Sarei v. Rio Tinto*, 550 F.3d 822, 824 (9th Cir. 2008) (claims arising in Papua New Guinea); *Romero v. Drummond Co.*, 552 F.3d 1303, 1308-09 (11th Cir. 2008) (claims arising in Colombia); *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 260-62 (2d Cir. 2007) (claims arising in South Africa); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1245 (11th Cir. 2005) (claims arising in Guatemala); *Lev v. Arab Bank, PLC*, No. 08-CV-3251 (NG)(VVP), 2010 WL 623636, *3 (E.D.N.Y. 2010)

even questioned, whether the ATS applied to human rights violations committed outside U.S. territory. While there are a series of doctrines of deference which may limit ATS claims in particular cases,[25]

(defendant's argument that the ATS does not apply extraterritorially was held to be "meritless"); *In re XE Services Alien Tort Litigation*, 665 F. Supp. 2d 569, 573 (E.D. Va. 2009) (claims arising in Peru); *Chowdhury v. WorldTel Bangladesh Holding, Ltd.*, 588 F. Supp. 2d 375, 378 (E.D.N.Y. 2008) (claims arising in Bangladesh); *Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355, 1357 (S.D. Fla. 2008) (claims arising in Cuba and Curacao); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1083 (N.D. Cal. 2008) (claims arising in Nigeria); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 259-60 (E.D.N.Y. 2007) (claims arising in Israel); *John Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 990 (S.D. Ind. 2007) (claims arising in Liberia); *Arias v. Dyncorp*, 517 F. Supp. 2d 221, 223 (D.D.C. 2007) (claims arising in Ecuador).

[25] Political question, international comity, *forum non conveniens* and the Foreign Sovereign Immunities Act ("FSIA") have been among the most commonly used doctrines to resolve conflicts of interest with foreign sovereigns in ATS cases. *See, e.g., Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (FSIA); *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283 (11th Cir. 2009) (*forum non conveniens*); *Corrie v. Caterpillar*, Inc., 503 F.3d 974 (9th Cir. 2007) (political question); *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005) (ATS political question); *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540, (international comity and *forum non conveniens*). This Court referred to such doctrines of case specific deference in *Sosa*. 542 U.S. at 733, n.21.

extraterritoriality has never been one of them. The judicial imposition of a territorial limitation on ATS claims is an inappropriate substitute for these well-established doctrines.

Not only has Congress not chosen to limit the ATS or overturn *Sosa*, it has added the Torture Victim Protection Act to § 1350, which explicitly grants U.S. courts extraterritorial jurisdiction for extra-judicial execution and torture of U.S. citizens.[26] *See* 28 U.S.C. § 1350. Congress cited approvingly to *Filartiga* in its passage of the TVPA and noted that "Section 1350 has other important uses and should not be replaced."[27] H.R. Rep. No. 102-367, pt. 1, p. 3 (1991); *see also* S. Rep. 102-249, pt. 5 (1991). One of the main purposes of passing the TVPA was to

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[26] In *Sosa*, this Court indicated that Congress had "expressed no disagreement with our view of the proper exercise of the judicial power," rather Congress had "responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail" through its enactment of the Torture Victim Protection Act. *Sosa*, 542 U.S. at 731.

[27] Congress also cited approvingly to *Forti v. Suarez Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), which applied the reasoning in *Filartiga*, to claims arising out of the "Dirty War" in Argentina. *See* S. Rep. 102-249, Pt. 4 (1991). Congress noted that the TVPA was in part a specific response to Justice Bork's concurrence in *Tel-Oren*, which expressed doubt over a private right of action under the ATS. *See* H.R. Rep. No. 102-367, pt. 1, p. 3 (1991, *reprinted in* 1992 U.S.C.C.A.N. 84, 86); S. Rep. 102-249, pt. at 4 (1991).

expand to U.S. citizens the civil remedies for torture committed extraterritorially.[28] *Id.* It is clear that the *Sosa* Court, the lower courts and Congress have approved of extraterritorial application of the ATS. There are no cases, much less a split of authority, on this issue justifying review in this case.

D. International Law Does Not Limit the Extraterritorial Application of the ATS.

International law has always permitted states to exercise jurisdiction over acts committed outside their territorial jurisdiction as long as such jurisdiction is not prohibited by international law. *See S.S. "Lotus" (Fr. v. Turk.)*, at 18-19. Not only is there no international norm prohibiting the exercise of civil jurisdiction for acts committed extraterritorially, many states and courts have endorsed civil jurisdiction over such claims.[29]

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[28] "There should also, however, be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing." H.R. Rep. No. 102-367, pt. 4 (1991); *see also* S. Rep. 102-249, pt. 5 (1991).

[29] *See Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment ¶ 155 (Dec. 10, 1998) (indicating human rights victims could bring civil suits in foreign courts for damages); *see also*, Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 Am. J. Int'l L. 142, 148-52 (2006) (noting that states such as Britain and Italy have found jurisdiction in cases of torture committed wholly in a

There is no doubt about the legitimacy of U.S. courts adjudicating tort claims against a foreign corporation which conducts ongoing business in New York. Restatement, at § 401(b) and § 421(1), (2)(h). Jurisdiction to adjudicate is reasonable when "the person, whether natural or judicial, regularly carries on business in the state."

United States courts violate no international norm by imposing tort liability on a foreign corporation doing substantial ongoing business in the United States for its complicity in genocide, war crimes and crimes against humanity.

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foreign nation and that the Convention Against Torture and The Hague Judgments Convention have supported similar claims); Restatement (Third) of Foreign Relations, § 404 cmt b (1987) ("In general, jurisdiction on the basis of universal interests has been exercise in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims or piracy.").

CONCLUSION

For all of these reasons the Conditional Cross-Petition should be denied.

Date: June 23, 2010

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No. 09-1418

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Supreme Court of the United States

TALISMAN ENERGY, INC.,
Petitioner,
vs.
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Respondents respectfully submit this Supplemental Brief pursuant to Rule 15.8 in response to the *amicus curiae* briefs of Professors James Crawford and Malcolm N. Shaw in support of Talisman Energy, Inc.'s ("Talisman") Conditional Cross-Petition.[1]

INTRODUCTION

The Alien Tort Statute ("ATS") is a civil tort statute providing common law remedies for violations of the law of nations. There is no dispute in this case that plaintiffs have alleged violations of the law of nations (genocide, war crimes and crimes against humanity) actionable under *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25 (2004). The issue in this case is whether, under principles of federal common law or customary international law, Talisman may be found liable in tort for its complicity in these indisputable human rights violations.

The amicus briefs submitted by Professors Crawford and Shaw offer no reason for this Court to grant Talisman's Conditional Cross-Petition. These *Amicus* briefs do not alter the fact that *no* decision supports Talisman's claims that corporations are exempt from liability under the ATS or that the ATS is limited to acts occurring within the territory of the United States. No principle of international law, in

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[1] These briefs were filed and received by Respondents' counsel after the deadline for the submission of Respondents' Opposition to the Conditional Cross-Petition.

1789 or now, prevents U.S. courts from adjudicating ATS cases such as these against private entities, including corporations subject to personal jurisdiction in the United States.

Neither Professor Crawford nor Professor Shaw is an expert on U.S. law or this Court's *Sosa* decision. Professor Crawford has been Talisman's expert in this case since 2002. The district court rejected essentially the same arguments when they were submitted in affidavit form, dismissing them as "anachronistic." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 315 (S.D.N.Y. 2003).

Professor Crawford bases his brief on Talisman's flawed interpretation of footnote 20 in *Sosa*. 542 U.S. at 733. Thus, his opinion that an ATS plaintiff must show that a particular ATS defendant owes a duty to the ATS plaintiff under general international law in order to state a viable ATS claim is not based on *Sosa* or any other ATS decision. Crawford Br. 3. The language of the ATS contains no exemption for corporations or any other defendant. The Founders were well aware of corporations by 1789 and knew how to exclude them from a statute if that was the intention. *Cf. Citizens United v. Federal Election Com'n*, 130 S. Ct. 876, 925-26 (2010) (Scalia, J., concurring).

Similarly, Professor Shaw's brief ignores established U.S. jurisprudence, dating back to the founding of our nation, allowing U.S. courts to adjudicate transitory torts, on which the Second

Circuit's seminal decision in *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980), was based. Both briefs ignore the language, history and purpose of the ATS, this Court's *Sosa* decision and the entire body of ATS jurisprudence.

I. PROFESSOR CRAWFORD'S OPINIONS REFLECT A FUNDAMENTAL MISUNDERSTANDING OF THE ATS AND *SOSA*.

Professor Crawford's opinions are based on a fundamental misunderstanding of U.S. law, including the ATS, and of this Court's opinion in *Sosa*. As Judge Edwards emphasized in *Tel Oren v. Libyan Arab Republic*, 726 F. 2d 744, 791 (D.C. Cir. 1984) (Edwards, J., concurring), and as this Court confirmed in *Sosa*, 542 U.S. at 724, to read the ATS as requiring that the elements of the federal common law cause of action be found in international law would render the ATS a dead letter because international law does not characteristically specify the domestic means for its enforcement. Such a reading would clash with the fundamental principle of statutory construction that a statute should not be construed "so as to render any part of it 'inoperative or superfluous, void or insignificant'" *Tel Oren*, 726 F.2d at 778 (finding that international law does not define the means of its enforcement) (Edwards, J., concurring).

Professor Crawford states that "even if corporate liability were recognized under customary international law, it is not 'accepted by the civilized

world and defined with specificity comparable to the features of the 18th century paradigms," as required by *Sosa*." Crawford Br. 15. However, there is nothing in *Sosa* that states, much less holds, that the historical paradigm test applies to any issue beyond the threshold "law of nations" violation conferring jurisdiction upon the courts to provide a federal common law remedy for such violations.

His views concerning State responsibility under international law are not relevant to the question of whether private actors, such as Talisman, may be subject to liability in federal courts under the ATS. This Court's inclusion of corporations in the category of private actors potentially subject to liability under the ATS implicitly rejects Professor Crawford's attempt to undermine existing ATS jurisprudence. *Sosa*, 542 U.S. at 733 n.20.

In *Sosa*, this Court recognized that the law of nations includes "hybrid" norms that regulate the conduct of private actors and contemplate the private enforcement of such norms. *Sosa*, 542 U.S. at 715. This Court's historic paradigm test recognized that certain modern customary international law norms fall within the "hybrid" category of norms contemplated by the Founders and are actionable under the ATS.[2]

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[2] "There was finally, a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships. Blackstone referred to it when he mentioned three specific offenses against the law of nations addressed by the

In his analysis of international corporate liability, Crawford relies almost exclusively on international criminal law. The ATS, however, is a civil tort statute. Professor Crawford refers to "[s]ubstantive criminal law treaties and treaties establishing international courts and tribunals." Crawford Br. 4. But the international instruments Crawford refers to are products of political compromises to establish particular institutions and were not meant to embody customary international law, or to create any corporate immunities from criminal or civil liability in domestic courts.[3] These treaties explicitly do not purport to supplant customary international law. Scheffer Br. 7.[4]

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criminal law of England: violation of safe conducts, infringement of rights of ambassadors, and piracy . . . . It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on the minds of the men who drafted the ATS with its reference to a tort." *Sosa*, 542 U.S. at 715.

[3] As Professor David Scheffer explains, the Rome Statute reflects years of compromise among states. In particular, Article 25(3)(e) addressing secondary liability retains an ambiguity that only the ICC itself can resolve in a future case. Brief of David J. Scheffer as *Amicus Curiae* in support of the issuance of a writ of certiorari, at 25, *Presbyterian Church of Sudan v. Talisman*, No. 09-1262 (May 19, 2010) ("Scheffer Br.")

[4] There are numerous modern treaties that explicitly provide for the liability of non-natural persons,

The implication of Professor Crawford's opinions is that it would violate international law for a State to impose civil or criminal liability on corporations that aid and abet widespread and systematic human rights violations. But the absence of an international corporate regulatory regime does not mean that domestic legal regimes are incapable of enforcing the law of nations against private actors, as the Founders provided for in the ATS.

It is up to each State to decide if it will impose criminal or civil sanctions on private actors, such as corporations, that violate customary international law norms. Moreover, some States have applied international rules prohibiting genocide, slavery and torture against individuals, such as companies and government officials in their domestic systems and impose criminal liability on violators.[5] For example,

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such as corporations. *See, e.g.*, International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 256; Convention on Combating Bribery of Foreign Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1. Thus, any argument that international law generally does not apply to corporations has been superseded by numerous actions taken by the international community.

[5] *See* International Commission of Jurists, 2 Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes (2008) ("ICJ Report"), http://icj.org/IMG/Volume_2.pdf. The ICJ Report notes that while international fora only have jurisdiction to prosecute corporate officials, not corporate entities,

in Australia, the extraterritorial offenses of genocide, crimes against humanity, and war crimes were enacted in the Commonwealth Criminal Code to give effect to the crimes within the ICC's jurisdiction under Australian law. The code explicitly imposes criminal liability upon corporations for gross human rights abuses committed abroad and confers universal jurisdiction over such crimes.[6] Under Professor Crawford's analysis, such legislation would violate international law but this is plainly not the case.

Even if international law was relevant to the issue of corporate liability, an examination of international consensus on corporate civil liability cannot focus solely on the treatment of corporations in international criminal treaties. Professor Crawford ignores the fact that corporate civil liability

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national legal systems have the power to prosecute corporate entities for breaches of international law. The report also indicates that corporations may be sued in tort in domestic legal systems for such violations.

[6] Criminal Code Act, 1995, § 268 (Austl.), *amended by* Criminal Court Act, 2002 (Austl.); *see also* Joanna Kyriakakis, *Australian Prosecution of Corporations for International Crimes*, 5 J. Int'l Crim. Just. 809 (2007). Corporations are also capable of prosecution for core international crimes under Canadian Criminal law. *See* Canadian Criminal Code, R.S.C., ch. C-46, § 2 (1985) (defining "everyone" and "person" to include corporate entities).

is a general principle of law found in all legal systems."[7]

For example, the International Commission of Jurists Expert Panel on Corporate Accountability and Legal Complicity, cited by Crawford. (Crawford Br. 12-14), found that civil liability for corporations who perpetuate or aid violations of customary international law norms is widely accepted and recognized.[8]

In sum, the Crawford brief offers no evidence for any international exemption or immunity for corporations when they aid and abet violations of paradigmatic norms "admitting a judicial remedy and at the same time threatening serious consequences in international affairs." *Sosa*, 542 U.S. at 715. No such evidence exists.

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[7] *See* Restatement (Third) of the Foreign Relations Law of the United States § 102 reporters' note 1 (1987) (discussing general principles as a source of international law).

[8] *See* ICJ Report, *supra*, Volume 3, http://icj.org/IMG/Volume3.pdf. *See also* Brief of *Amici Curiae* International Law Scholars in Support of Plaintiffs-Appellees, *Balintulo v. Daimler* at 15-19, No. 09-2778-CV (Dec. 22, 2009) (reviewing a survey of corporate liability regimes in twenty-two countries, representing both common law and civil law tradition, wide geographic distribution, and varying levels of economic development, confirmed "no jurisdiction that lackedl the legal means of holding juridical persons accountable for their actions.")

II. THE EXTRATERRITORIAL APPLICATION OF THE ATS VIOLATES NO NORM OF INTERNATIONAL LAW.

A. The ATS Provides a Forum for the Adjudication of Transitory Torts Based on the Law of Nations.

Professor Shaw ignores common law jurisprudence that dates back to the founding of this country allowing courts to adjudicate transitory torts regardless of the nationality of the parties or where the tort arose.[9]

Sosa confirmed that at the time the ATS was passed, the law of nations was understood to be part of federal common law. *Sosa*, 542 U.S. at 720-25. Thus, there is little doubt that the Founders understood that the ATS provided a remedy for transitory torts in violations of the law of nations.

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[9] *See McKenna v. Fisk*, 42 U.S. 241, 248 (1843) ("Crimes are, in their nature local . . . . But personal injuries are of a transitory nature, and *sequuntur forum rei*") (citing Chief Justice De Grey); *Dennick v. Central R. Co. of N.J.*, 103 U.S. 11 (1880) ("It is no objection that all the parties to the suit are aliens or non-residents, and that the cause of action arose abroad.") (internal citations omitted); *Watts v. Thomas*, 5 Ky. (2 Bibb) 458 (1811) (assault and battery claims are transitory); *see also Printz v. U.S.*, 521 U.S. 898, 907 (1997) (noting in relation to transitory actions that U.S. courts "applied the law of other sovereigns all the time" and citing to *McKenna v. Fisk*).

See Filartiga v. Pena-Irala, 630 F.2d 876, 885-86 (2d Cir. 1980) (situating the ATS within the history of transitory torts); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 503 (9th Cir. 1992) (citing *Filartiga* to state that "the First Congress enacted the predecessor to §1350 to provide a federal forum for transitory torts (a tort action which follows the tortfeasor wherever he goes.)"). Professor Shaw's opinions completely ignore this history and precedent.

B. The Adjudication of Transitory Torts Based on Violations of the Law of Nations Has Never Been Prohibited by International Law.

Professor Shaw's view that United States courts violate international law by adjudicating transitory tort claims conflicts with established U.S. law and goes beyond the authorities he cites. International law has always permitted States to exercise jurisdiction over acts committed outside their territory as long as such jurisdiction is not prohibited by international law. *See S.S. "Lotus" (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18-19 (Sept.7).

Since the Founding of the United States, courts have held that jurisdiction exists over transitory torts committed extraterritorially by

foreign defendants against foreign plaintiffs.[10] Foreign nations have also recognized civil claims arising from extraterritorial conduct.[11] Additionally, international courts have endorsed the domestic adjudication of extraterritorial civil claims arising from gross violations of international law.[12] There is no doubt, that the adjudication of extraterritorial transitory torts committed by foreign defendants against foreign plaintiffs is permitted by international law.[13]

Professor Shaw's concerns about the reach of the ATS have been appropriately addressed by the courts through various doctrines of discretion,

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[10] *See, e.g., Carbotrade S.P.A. v. Bureau Veritas*, 99 F.3d 86, 91-93 (2d Cir. 1997) (jurisdiction existed over a foreign plaintiff and defendant for a tort arising in Greece); *Morisette v. Canadian Pac. Ry. Co.*, 76 Vt. 267 (1904) (jurisdiction existed over a Canadian resident plaintiff and a Canadian corporation defendant over a tort claim arising in Canada); *Roberts v. Dunsmuir*, 75 Cal. 203 (1888) (jurisdiction existed over two foreign defendants for a tort arising in Canada when personal service was made within the United States).

[11] *See* Br. in Opp'n. to Talisman's Conditional Cross-Pet. 29 n.29.

[12] *See Id.* at 29.

[13] *See* William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 Harv. Int'l L.J. Online 35, 38-44 (2010), http://www.harvardilj.org/articles/dodge.pdf.

including *forum non conveniens* and international comity. *See Sosa*, 542 U.S. at 733 n.21.[14] Talisman raised and lost these arguments below and did not cross-appeal any of them. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 335-49 (S.D.N.Y. 2003) (rejecting Talisman's arguments on *forum non conveniens*, international comity, act of state and political question). The Second Circuit did not consider any of these doctrines. These well-established doctrines address all of Professor Shaw's professed concerns on Talisman's behalf in a more appropriate, nuanced manner than the argument that the ATS has no extraterritorial application.

C. The ATS Is Only One of Several U.S. Laws Permitting the Adjudication of Extraterritorial Claims Involving Foreign Actors.

There are many other areas of the law where extraterritorial jurisdiction has been affirmed in cases involving completely extraterritorial claims and foreign litigants. For example, in *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 484-86 (1983), this Court held that jurisdiction could exist in a civil

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[14] *See, e.g., Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009) (foreign sovereign immunity); *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005) (political question); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (*forum non conveniens*); *Torres v. S. Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997) (international comity and *forum non conveniens*).

suit brought under the Foreign Sovereign Immunities Act over a claim between foreign parties that arose abroad.[15]

The Racketeering Influenced and Corrupt Organizations Act ("RICO"), has also been applied extraterritorially against foreign defendants by foreign plaintiffs.[16] Professor Shaw's view would alter the U.S. legal landscape in a manner with implications far beyond the ATS.

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[15] *See also Republic of Arg. v. Weltover*, 504 U.S. 607 (1992).

[16] *See, e.g., Licea v. Curacao Drydock Co., Inc.*, 584 F. Supp. 2d 1355, 357-59 (S.D. Fla. 2008) (jurisdiction under RICO for actions involving Cuban plaintiffs and Curacao-based defendants for claims arising in Cuba and Curacao).

CONCLUSION

For all of these reasons, the views of Professors Crawford and Shaw offer no additional reasons for this Court to grant Talisman's Conditional Cross-Petition. The Conditional Cross-Petition should be denied.

Dated: July 20, 2010

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IN THE

Supreme Court of the United States

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A., FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the Estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KEIGWONG RAT, LUKA AYOUL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER KING PATAI, CHIEF GATLUAK CHIEK JANG,

Petitioners,

v.

TALISMAN ENERGY INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* PROFESSOR JAMES CRAWFORD IN SUPPORT OF CONDITIONAL CROSS-PETITIONER

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INTEREST OF *AMICUS CURIAE*

This Brief *Amicus Curiae* is respectfully submitted pursuant to Rule 37 of the Supreme Court Rules in support of Defendant-Conditional Cross-Petitioner, Talisman Energy Inc. ("Talisman Energy").[1] *Amicus* is Whewell Professor of International Law at the University of Cambridge and was the fifth and final Special Rapporteur for the International Law Commission's ("ILC") Articles on the Responsibility of States for Internationally Wrongful Acts.[2] *Amicus* was retained by Talisman Energy in 2004 to give expert evidence at first instance and on appeal. *Amicus* believes this submission will assist the Court regarding the existence and content of customary international law rules as they bear on issues raised in this appeal.

SUMMARY OF ARGUMENT

International law as yet contains no norm of corporate responsibility, civil or criminal, "accepted by the civilized world and defined with specificity comparable to the features of the 18th century paradigms [this Court has] recognized,"[3] that extends liability for torts committed in violation of customary international law to corporations.

Customary international law, as it stands today, does not include a corporate responsibility regime. The

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[1] No counsel for any party authored this brief either in whole or in part. Both parties have consented in writing to the filing of this brief and their consents have been filed with the Clerk. Respondent-Conditional Cross Petitioner Talisman Energy Inc. has compensated me for my time spent preparing this submission.

[2] *See Curriculum Vitae* in Appendix.

[3] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

development of international criminal law has been limited to certain categories of wrongful conduct – namely, genocide, crimes against humanity, war crimes, torture, and enslavement. Each international crime is a crime attributable only to natural persons. The international criminal tribunals established since World War II likewise prosecuted (and prosecute) only individuals. The closest analogy in international law to civil responsibility under national law is the regime of international responsibility of States, certain State-like entities and public international organizations. Corporations (except where otherwise provided by treaty) remain creatures of national legal systems. There is so far no basis in general international law for attributing international legal responsibility to a corporation.

To summarize, at present there is no international law norm "accepted by the civilized world and defined with specificity comparable to the features of the 18th century paradigms [this Court has] recognized," extending liability for torts committed in violation of customary international law to corporations. This standard requires universal acceptance and thus imposes a higher threshold to be met than the one of general acceptance required for the formation of customary international norms.

Finally, the assertion of jurisdiction against a Canadian corporation based on events that occurred in Sudan would constitute an exercise of universal jurisdiction that has no basis under international law.

ARGUMENT

I. THERE IS NO INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS LIABILITY FOR TORTS COMMITTED IN VIOLATION OF CUSTOMARY INTERNATIONAL LAW.

As this Court said in *Sosa*, only certain violations of international law are covered by the Alien Tort Statute ("ATS"): those "accepted by the civilized world and defined with specificity comparable to the features of the 18th century paradigms."[4] These were the three offences referred to by Blackstone: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[5] The ATS does not make wrongful as a matter of U.S. federal law just any violation of international law, but covers only "a very limited category defined by the law of nations and recognized at common law."[6] There is a dual test: the rules for which an ATS claim lies must be rules "binding individuals for the benefit of other individuals," while at the same time established by "the norms of state relationships" such as, or analogous to "violation of safe conducts, infringement of the rights of ambassadors, and piracy" in the late 18th century.[7] Thus the only ATS claims cognizable now are those "based on the present-day law of nations" and even more narrowly those accepted with the specificity of the 18th century paradigms.[8]

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[4] *Sosa*, 542 U.S. at 724-5.

[5] W. Blackstone, 4 *Commentaries* 68.

[6] *Sosa*, 542 U.S. at 712.

[7] *Id.* at 716.

[8] *Id.* at 725.

In principle international law operates only horizontally, *i.e.*, between entities recognised as having international legal personality such as States and international organizations. The effect of international law as binding upon individuals is an exception that has to be formulated explicitly, as is done in the instruments imposing international criminal responsibility on natural persons. As it stands, international law does not purport to regulate corporations directly but allows or sometimes obliges States to do so and, in the course of doing so, to criminalize certain corporate behaviours.

A. Customary International Law Does Not Recognize Corporate Liability.

1. Insofar as International Law has Recognized Direct Criminal Responsibility, It has Done so Only With Respect to Individuals, Not Corporations.

There is no general regime for corporate criminal responsibility under international criminal law. Substantive criminal law treaties and treaties establishing international criminal courts and tribunals have focused exclusively on individual criminal responsibility. Genocide, war crimes, torture, and enslavement are acts recognized as crimes in international law. But in general, treaties defining international crimes envisage that only individuals may be prosecuted for them. The treaties make no attempt to solve the range of legal issues that arise regarding attributing specific intent to corporations, let alone questions of the applicable sanctions or

penalties for corporations.[9] As to the four main categories of international crimes, the position is that criminal responsibility is attributed to individuals, not corporations. In particular: Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide provides:

> Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.[10]

The acts enumerated in Article III of the Convention include conspiracy, incitement and complicity. The Convention speaks consistently of "persons": "persons guilty of genocide or any of the other acts enumerated in article III" (Article V); "persons charged with genocide or any of the other acts enumerated in article III" (Article VI). The reference to "persons" here is to individuals, *i.e.* natural persons. Only they can have the specific intent required for genocide. In

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[9] The former Article 19 of the ILC's Draft Articles on State Responsibility (1996) sought to introduce the concept of "international crimes of States." It was deleted from the final text of the Articles. *See* ILC Commentary to Chapter 2, Part III, paras. 6-7, *reprinted in* J. Crawford, *The International Law Commission's Articles on State Responsibility* 243-45. The ILC's final decision in this regard was specifically approved by the International Court of Justice in the *Bosnia* case: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)*, 2007 I.C.J. No. 91, ¶¶ 167, 170 (Feb. 26).

[10] Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, entered into force Jan. 1951, Art. 4, 78 U.N.T.S. 277.

fact only individuals have ever been prosecuted for genocide.[11]

With respect to war crimes, the 1949 Geneva Conventions[12] provide for effective penal sanctions "for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined" by the relevant articles.[13] In this context, criminal responsibility for grave breaches is evidently a matter of individual, not corporate, responsibility under the Conventions. The position with respect to internal armed conflict under the Second Protocol of 1977 equally contemplates only the penal responsibility of individuals.[14]

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[11] The leading commentator on the Convention confirms that it does not envisage "civil genocide". *See* W. Shabbas, *Genocide in International Law*, 444 (Cambridge, CUP, 2000).

[12] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, signed 12 August 1949, entered into force 21 October 1950, 75 U.N.T.S. 31 (1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, signed 12 August 1949, entered into force 21 October 1950, 75 U.N.T.S. 85 (1950); Geneva Convention Relative to the Treatment of Prisoners of War, signed 12 August 1949, entered into force 21 October 1950, 75 U.N.T.S. 135 (1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, signed 12 August 1949, entered into force 21 October 1950, 75 U.N.T.S. 287 (1950).

[13] *See, e.g.*, Geneva Convention I, 75 U.N.T.S. 31, Art. 49.

[14] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted 8 June 1977, entered into force 7 December 1978, 1125 UNTS 609, esp. Art. 6 (2) (b) ("no one shall be convicted of an offence except on the basis of individual penal responsibility"). Neither the Republic of the Sudan nor the United States of America is a party to Protocol II.

The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[15] provides for the crime of torture, defined in Article 1 as torture "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Each State is required to "ensure that all acts of torture are offences under its criminal law," including "an attempt to commit torture and . . . an act by any person which constitutes complicity or participation in torture" (Article 4).

Finally, reference should be made to the Convention to Suppress the Slave Trade and Slavery of 1926 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.[16] These conventions establish the principle that no person may be held as a slave, *i.e.*, as property, and this principle is of general application.[17] The Slavery Conventions do not create any regime of corporate responsibility for slavery under international law: rather they impose an obligation on States parties to impose severe penalties for slave trading and related infractions (1956 Convention, Art. 6).

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and most of its provisions remain binding as treaty law only and have not reached the status of customary international law.

[15] Adopted 10 December 1984, entered into force 26 June 1987, 1465 U.N.T.S. 85.

[16] Convention to Suppress the Slave Trade and Slavery of 1926, Sept. 25, 1926, 60 L.N.T.S. 253; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3.

[17] *Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5).

As a matter of existing international law, the human rights conventions including the Genocide Convention and the Geneva Conventions do not reach conduct by corporations either. It is clear from the language of human rights treaties that it is States, acting through their organs and their agents, which must "respect," "ensure" and "secure" the rights envisaged in the conventions. Where human rights treaties express goals of realization of human rights, these have been interpreted by human rights bodies as imposing obligations on States to regulate the activities of persons, including corporations, through domestic law.

True, it has been held that corporations may be beneficiaries of international human rights.[18] But currently *responsibility* under all the human rights treaties, universal and regional, is exclusively that of the State. Thus under current international human rights law there is no basis for holding corporations directly responsible.[19]

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[18] *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 34, Nov. 4, 1950, 213 U.N.T.S. 222. The first case brought by a corporation pursuant to Article 34 was *Sunday Times v. United Kingdom* (series A No. 30), European Court of Human Rights, 2 EHRR 245 (Apr. 26, 1979).

[19] *See, e.g.*, John Ruggie, Report of the Special Representative of the Secretary-General on the Issues of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. A/HRC/4/035, ¶ 44 (Feb. 9, 2007) ("In conclusion, it does not seem that the international human rights instruments discussed here currently impose direct liabilities on corporations.").

2. None of the Constituent Instruments of the Five International Criminal Tribunals Created to Date Provided, or Provide, for Corporate Criminal Responsibility.

There have been five international criminal tribunals: the two established at Nuremberg and Tokyo following World War II, the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, and the International Criminal Court.[20]

The Charter of the Nuremberg Tribunal provided for the trial of persons who "whether as individuals or as members of organizations" committed specified crimes.[21] In every instance, those standing as accused were individuals. Only individuals were prosecuted before the International Military Tribunal for the Far East.[22]

The Statute of the International Criminal Tribunal for the Former Yugoslavia provides for jurisdiction only over natural persons.[23] Likewise the Statute of the International Criminal Tribunal for Rwanda.[24]

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[20] This does not include the so-called "hybrid" tribunals such as that established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council Resolution 1315 (Aug. 14, 2000).

[21] The Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, Art. 6, 82 U.N.T.S. 279.

[22] *See* B.V.A. Roling & A. Cassese, *The Tokyo Trial and Beyond*, at 3 (Cambridge, Polity Press, 1993).

[23] Statute of the International Criminal Tribunal for the Former Yugoslavia, Arts. 2-6, May 25, 1993, 32 I.L.M. 1203.

[24] Statute of the International Criminal Tribunal for Rwanda, Arts. 2-5, Nov. 8, 1994, 33 I.L.M. 1598.

The Rome Statute of the International Criminal Court entered into force on July 1, 2002.[25] Consideration was given to developing principles of corporate criminal responsibility in the Rome Statute, but these attempts failed, due *inter alia* to divergences in national approaches.[26] The episode is significant, concerning as it does the central international criminal law instrument of our time. It demonstrates the absence of any accepted rules or standards for corporate criminal responsibility under international law.

3. The Development of General International Responsibility has been Almost Exclusively With Respect to States, State Entities, and Public International Organizations, and Not With Respect to Corporations.

I turn to questions of general international responsibility, which may be analogized to civil responsibility under national legal systems for delicts, breaches of contract, etc. Here the focus of international law has been almost exclusively on States, State entities, and public international organizations. Nor is there any evidence supporting a general international law of corporate complicity for involvement in breaches of international law by States or international organizations.

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[25] Adopted July 17, 1998, UN Doc A/CONF.183/9 (1998), 2187 U.N.T.S. 90.

[26] *See, e.g.*, Ambos, in Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, at 478 (Baden-Baden, Nomos Verlag, 1999).

In international law, there is a correlation between international legal personality and international responsibility. The State itself is directly responsible under international law for internationally wrongful acts attributable to it, as are other international legal persons such as public international organizations.[27] But while international law confers rights on individuals and corporations or other entities (*i.e.*, persons not considered distinct international legal persons with an independent capacity to act on the international plane), the only significant attempts so far to impose direct responsibility or liability on such persons or entities have been in the field of international criminal law and there, exclusively with respect to natural persons.

No doubt States may agree to treat a corporate entity—such as, for example, the Arab Organization for Industrialization—as an international legal person, at least for certain purposes.[28] But general international law does not recognize the international legal personality of "transnational" or "multinational" corporations. Corporations remain entities, or groups of entities, created by the national law(s) of their place(s) of incorporation.

There have been tentative developments in the direction of asserting international responsibility, *e.g.* of armed insurgents and opposition groups. It may be that this will be extended in future to cover corporations and other non-State entities; but at

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[27] *Cf. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 1999 I.C.J. 62, at ¶ 66.

[28] *See Westland Helicopters Ltd. v. Arab Organisation for Industrialisation*, [1995] 2 All E.R. 387.

present discussion of such questions is embryonic and tends to use looser terms such as "accountability" or "social responsibility." International law creates direct responsibility for specific acts defined as international crimes, but beyond that it does not have its own system of responsibility for breaches of international law on the part of persons generally, still less its own special system of corporate responsibility.[22]

4. The Report of the International Commission of Jurists' Expert Legal Panel on Corporate Complicity in International Crimes Confirms That No Rule on Corporate Liability has yet Crystallized in International Law

In its 2008 Report on Corporate Complicity and Legal Accountability, the International Commission of Jurists (the "ICJ"), based on a three-year study, analyses the issues of corporate liability in national laws and in international criminal law. The three volumes notably say nothing about corporate liability under international criminal law or general international law. Moreover, the only possible consequence from companies' alleged participation in gross human rights abuses that the ICJ draws in its conclusions is the so called "zone of legal risk." That zone certainly exists under the various national laws, but nothing is said as to corporate criminal responsibility or civil

[22] International treaties increasingly provide forums for private persons and corporations to seek to vindicate rights at the international level, *e.g.* the various human rights courts, and arbitration tribunals concerned with the protection of investment. But invariably it is the State or a State entity that is the respondent, and these mechanisms do not allow for the respondent State to bring counterclaims for breaches of international law against the private party.

liability in international law. The ICJ avoided analysing the core issue of whether companies are subjects or addressees of international law at all.

The Criminal Law and International Crimes Report begins by acknowledging that "no international forum yet has jurisdiction to prosecute a company as a legal entity."[30] Indeed, all the examples given by the ICJ Panel for holding corporations criminally responsible relate to business officials as opposed to corporations and all are drawn from a purely domestic legal context.[31] The study also observes that "not all jurisdictions hold businesses responsible under their national criminal laws."[32] This conclusion, being based on the study of numerous national legal systems, serves to refute the argument that corporations may be held responsible pursuant to the general principles of law recognized by civilized nations.

Finally, the Panel itself concludes that "significant opposition to the imposition of criminal sanctions on companies as legal entities remains."[33] While the

[30] International Commission of Jurists, 2 Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, at 6 (2008).

[31] *Id.* at 60, nn 189, 190 (citing two acquittal judgements of the Italian Court of Appeals and The Hague Court of Appeals, respectively, in cases against individuals for alleged breaches of United Nations embargoes: Judgement in the *Case against Leonid Efimovich Minin* and Judgement in the *Case against Guus Kouwenhoven*, Hague Court of Appeal, 10 March 2008, LJN BC 7373).

[32] *Id.* at 57.

[33] *Id.*

Report advocates the imposition of international criminal liability on companies in the future as a desirable development of the law, it nowhere claims that such corporate criminal liability already exists in international law.

The ICJ Report on Civil Remedies does not even attempt to identify an international law regime of civil liability for corporations. Instead, "the Panel explores the potential application of the law of civil remedies to some of the types of business interaction and interplay which can give rise to allegations of complicity"[34] by comparing the differences between civil and common law national regimes in that respect. The complete absence of any international law analysis of corporate civil liability clearly indicates that after its three-year study, the Panel itself could not identify any such concept in international law.[35]

In conclusion, the Report states that "[t]he Panel believes it to be of great importance that, in the context of *law-making* and *policy-setting*, steps continue to be taken to tackle, in appropriate ways, the obstacles to civil liability which can arise, and to ensure the continuing development of civil liability."[36]

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[34] International Commission of Jurists, 3 Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, at 28 (2008).

[35] *Id.* at 3-6.

[36] *Id.* at 6 (emphasis added).

B. Even If Corporate Liability were Recognized Under Customary International Law, It Is Not "accepted by the civilized world and defined with specificity comparable to the features of the 18th century paradigms," as required by *Sosa*.

The ATS in terms refers to "violations of the law of nations", on its face it does not apply a domestic United States standard but an international law one. The concept of the "law of nations" was addressed by the Permanent Court of International Justice in 1927 in the *Lotus Case*, where Judge Moore observed that piracy as an international crime *jure gentium* (against the law of nations) is to be distinguished from piracy under the different municipal laws "which are not of *universal cognizance*, so as to be punishable by all nations."[37] The present day standard for the formation of customary international law, affirmed by the International Court of Justice, is one of "*general recognition* that a rule of law or legal obligation is involved."[38] In the ATS context, the search is for a norm meeting an even higher threshold of being "specific, universal and obligatory" and which does not have "less definitive content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted."[39] The petitioner has to demonstrate the existence of a norm meeting this higher standard. Many rules of customary international law do not reach this level of specificity

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[37] Judge Moore, *Lotus Case* (1927), PCIJ, Series A, No 10, at 70 (emphasis added); *see* also *The Republic of Bolivia v The Indemnity Mutual Marine Assurance Co*, [1909] 1 KB 785.

[38] *North Sea Continental Shelf (F R G v Den ; F R G v Neth)*, 1969 I C J 3, 43 (Feb 20) (emphasis added)

[39] *Sosa*, 542 U S at 732

and universal acceptance. This is true, *a fortiori*, as concerns corporate responsibility under present international law.

The definition of piracy *jure gentium* nowadays has been confirmed and repeated in the Geneva Convention on the High Seas of 1958[40] and in the United Nations Convention on the Law of the Sea of 1982,[41] which now has 160 States parties. This definition must thus be regarded as having great authority.[42] The same can be observed with respect to the protection of the rights of diplomatic agents, including ambassadors, endorsed in general and regional multilateral treaties with even broader participation.[43] No comparable endorsement in a binding international treaty exists imposing direct corporate liability: either criminal or civil.

According to *Sosa*, the ATS does not create new causes of action. For an ATS action to lie requires the court to determine that "*international law* extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a

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[40] Geneva Convention on the High Seas, Art. 15, Apr. 29, 1958, 450 U.N.T.S. 82, Article 15.

[41] United Nations Convention on the Law of the Sea, Art. 101, Dec. 10, 1982, 1833 U.N.T.S. 3.

[42] *1 Oppenheim's International Law*, at 747 (9th ed. 1992).

[43] *See, e.g.*, United Nations Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, *entered into force* Feb. 20, 1977, 13 I.L.M. (1974); OAS Convention to Prevent and Punish the Act of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, *signed* Feb. 2, 1971, 10 I.L.M. 255 (1971).

private actor such as corporation or individual."[44] The federal courts do not have power "to mold substantive law,"[45] rather they take cognizance that under *existing* international law *this* defendant is liable for breach of an international law norm to *this* plaintiff in respect of the conduct alleged.

Moreover the recognition that such a norm exists creating a private right of action should be undertaken "with great caution."[46]

II. THE US DISTRICT COURT'S ASSERTION OF JURISDICTION IN THIS CASE INVOLVING CLAIMS BY SUDANESE PLAINTIFFS AGAINST A CANADIAN CORPORATION BASED ON EVENTS THAT OCCURRED IN SUDAN IS CONTRARY TO INTERNATIONAL LAW.

As Professor Shaw notes in his Amicus Curiae brief submitted in support of Conditional Cross-Petitioner, the issues of extraterritoriality and universal jurisdiction were raised by Justice Breyer in *Sosa*,[47] questioning whether the exercise of jurisdiction under the ATS was "consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement" in a situation like the present

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[44] 542 U.S. at 732 n. 20 (emphasis added). *See also id.* at 760 (Breyer, J. concurring) ("to qualify for recognition under the ATS a norm of international law ...must extend liability to the type of perpetrator (e.g., a private actor) the plaintiff seeks to sue")

[45] *Id.* at 713

[46] *Id.* at 728

[47] *Id.* at 761-2 Breyer, J., concurring

one, when "foreign persons injured abroad bring suit in the United States under the ATS, asking the courts to recognize a claim that a certain kind of foreign conduct violates an international norm." The conclusions of Professor Shaw are endorsed.

Petitioners say that the District Court had jurisdiction, *inter alia*, on the basis of principles of universal jurisdiction. This is highly questionable.

Universal jurisdiction "remains a matter of controversy within the international legal community,"[48] which casts doubt on petitioners' implied assertion that, with respect to the conduct in issue in the present case, it has achieved the degree of acceptance indicative of a customary international law rule. It has long been established that all States may exercise jurisdiction over piracy on the high seas, but that answers a different question—namely, how to deal with acts committed outside any territorial jurisdiction whatsoever.

Certain acts, in addition to piracy, are said to belong to a category of "crimes of universal jurisdiction." But this is a very limited category. It does not include the indirect involvement (conspiracy, etc.) that petitioners say Talisman Energy had in alleged offences in the Sudan.[49] Even where jurisdiction has

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[48] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v U.S.A.)*, 1998 I.C.J. 115, at 149 (dissenting opinion of Judge Oda) ¶ 8.

[49] For a list of several possible universal crimes, *see United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (Mikva, C.J.). *See also* the shorter list in *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab*

been exercised under the title "universal jurisdiction," it has not been without limits. In particular, such jurisdiction does not apply to a foreign defendant *in absentia*.[80] Universal jurisdiction, so called, has been accepted where the defendant had "established his centre of interests" in the national territory.[81] I understand that Talisman Energy cannot be said to have "established [its] centre of interests" in New York. As a matter of international law, the assertion of jurisdiction by a U.S. court over a Canadian company for conduct allegedly carried out in the Sudan by a foreign subsidiary is not supported by the mere presence in the United States of a different subsidiary of Talisman Energy having no link to Sudan.

Jamahiriya v. USA), 1998 I.C.J. 115, at 178, 179 (dissenting opinion of Judge Oda) ¶¶ 17, 20.

[80] *Arrest Warrant of April 11, 2000 (Congo v. Belg.)*, 2002 I.C.J. 3, 39-40, 42 (Feb. 11) (Separate Opinion of President Guillaume) ¶¶ 9, 12. In the *Arrest Warrant Case*, though on other grounds, a Belgian arrest warrant for a Congolese cabinet minister, issued on a theory of universal jurisdiction, was rejected. *Id.* at 29-30, ¶¶ 70-71.

[81] *Id.* at 41, ¶ 12.

CONCLUSION

For these reasons, international law currently furnishes no rule "accepted by the civilized world and defined with specificity comparable to the features of the 18th century paradigms" for corporate responsibility, either civil or criminal. Thus the petitioners fail to establish jurisdiction under the *Sosa* ruling of this Court.

Respectfully submitted,

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June 23, 2010

APPENDIX

CURRICULUM VITAE

CRAWFORD, James Richard

Born, Adelaide, 14 November 1948

TERTIARY EDUCATION & DEGREES

Adelaide University, 1966-1971, BA (English & History-Politics), 1971; LLB (first class honours), 1971, Stow Scholar, Australian Shell Scholar, 1971

DPhil (Oxon, 1977)

LLD (Cantab, 2004)

Juris Doctor honoris causa (Pázmány Péter Catholic University of Budapest, 2005; University of Paris-I Sorbonne, 2007)

HONOURS

PJN (Malaysia, 2007), Cavaler, Ordinul Național Servicio Credincios (Romania, 2009)

PROFESSIONAL QUALIFICATIONS

Barrister and Solicitor of the High Court of Australia (1977)

Barrister of the Supreme Court of New South Wales (called 6/11/1987); Senior Counsel (appointed 7/11/97)

Barrister, Gray's Inn (called March 1999); Foundation Member of Matrix Chambers, Gray's Inn, London

EMPLOYMENT

1. University of Adelaide. Lecturer, August 1974-7; Senior Lecturer, 1977-82; Reader, 1982-3; Professor of Law (personal chair), 1983-6.

2. Australian Law Reform Commission. Commissioner (full-time) 1982-84.

3. University of Sydney. Challis Professor of International Law, 1986-92, Dean, Faculty of Law, 1990-92.

4. University of Cambridge. Whewell Professor of International Law; Professorial Fellow of Jesus College (1992-); Director, Lauterpacht Research Centre for International Law (1995-2003, 2006-2010); Chair, Faculty Board of Law (2003-6).

GOVERNMENTAL AND INTERGOVERNMENTAL BODIES

Australian Law Reform Commission. Commissioner 1982-90 (part-time 1984-90).

Australian National Commission for UNESCO. Member 1984-88.

Australia, Constitutional Commission. Member, Advisory Committee on the Australian Judicial System 1985-87.

Member, Admiralty Rules Committee (Australia) 1989-92.

Member, United Nations International Law Commission (1992-2001).

COMMITTEES, PROFESSIONAL ASSOCIATIONS

Australasian Universities Law Schools Association: President (1985).

British Academy, Fellow (elected 2000)

Hague Academy of International Law, Member of the Curatorium (elected 1999)

Institut de Droit International. Associate (elected 1986), Member (1991-)

International Law Association. Director of Studies (1991-7)

Maritime Law Association of Australia and New Zealand (Honorary Member)

LEGAL PROFESSIONAL PRACTICE

Engaged as counsel in the following cases:

Before the International Court of Justice:

1. *Certain Phosphate Lands in Nauru (Nauru v. Australia)* ICJ Rep 1992 p240 (counsel for Nauru) (settled in August 1993).

2. *Territorial Dispute (Libya v. Chad)* ICJ Rep 1994 p 6 (counsel for Libya).

3. *East Timor Dispute (Portugal v. Australia)* ICJ Rep 1995 p 90 (counsel for Australia).

4. *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)* (counsel for Iran) (withdrawn pending settlement negotiations; settled 1996: see ICJ Rep 1996 p 9)

5. *Request for an Investigation of the Situation (New Zealand v. France)* ICJ Rep 1995 p 288 (counsel for Pacific Island States seeking to intervene: Samoa, Solomon Islands, Federated States of Micronesia, Marshall Islands)

6. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)*, ICJ Rep 1996 p 66 (counsel for Solomon Islands)

7. *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, ICJ Rep 1996 p 226 (counsel for Solomon Islands)

8. *Land and Maritime Dispute (Cameroon v. Nigeria)* ICJ Rep 1996 p 13 (Interim Measures); ICJ Rep 1998 p 275; ICJ Reports 2002 p 303 (counsel for Nigeria)

9. *Case concerning the Oil Platforms (Islamic Republic of Iran v. United States of America)* (senior counsel for Iran) ICJ Reports 1996 p 803.

10. *Gabčikovo Nagymaros Barrage System (Hungary v. Slovakia)* ICJ Rep 1997 p 7 (senior counsel for Hungary)

11. *Case concerning Sipidan and Ligitan (Malaysia v. Indonesia)* ICJ Rep 2002 p 625 (senior counsel for Malaysia)

12. *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (senior counsel for Croatia)

13. *Case concerning Certain Property (Liechtenstein v. Germany)* ICJ Reports 2006 p 6 (senior counsel for Liechtenstein)

14. *Case concerning Pulau Batu Puteh (Malaysia v. Singapore)*, judgment of 23 May 2008 (senior counsel for Malaysia)

15. *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004 p. 136 (counsel for Palestine)

16. *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, ICJ Reports 2009, judgment of 3 February 2009 (senior counsel for Romania), http://www.icj-cij.org/docket/files/132/14987.pdf?PHPSESSID=be89ba8849b0e8268722ac705f5ece1e

17. *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, judgment of 13 July 2009 (senior counsel for Costa Rica), http://www.icj-cij.org/docket/files/133/15321.pdf?PHPSESSID=be89ba8849b0e8268722ac705f5ece1e

18. *Territorial and Maritime Dispute (Nicaragua v. Colombia) (Merits)* (senior counsel for Colombia)

19. *Aerial Herbicide Spraying (Ecuador v. Colombia)* (senior counsel for Colombia)

20. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* (senior counsel for Georgia), Provisional measures application in International Court of Justice; senior counsel for Georgia. Case concerns ethnic cleansing in Georgia following Russian intervention of August 2008. Provisional measures granted. Order of 15 October 2008: http://www.icj-cij.org/docket/files/140/14801.pdf?PHPSESSID=a3d6a81cea830cc9fa986d357a86cd52

21. *Maritime Dispute (Peru v. Chile)* (senior counsel for Chile)

22. *Kosovo Advisory Opinion* (senior counsel for United Kingdom)

23. *Macedonia v. Greece* (senior counsel for Greece)

24. *Case concerning Japan's Whaling in the Southern Ocean (Australia v. Japan)*, (Counsel for Australia)

Before other international tribunals

1. *Islamic Republic of Iran v. United States of America, Cases Nos. A15(IV) and A24* Award No. 590-A15(IV)/A24-FT, 28 December 1998) 34 Iran-US CTR 105 (Iran-United States Claims Tribunal, Full Tribunal) (counsel for Iran)

2. *Prosecutor v. Blaškić (Objection to the Issue of Subpoenae duces tecum)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II) (1997) 110 ILR 606, on appeal, ibid. 668) (counsel for the Prosecutor).

3. *Tradex Hellas SA v. Albania* (1996, 1999) 5 ICSID Reports 43 (ICSID Tribunal) (senior counsel for Albania)

4. *Case concerning Southern Blue-fin Tuna (Australia & New Zealand v. Japan)* Order for interim measures of protection, International Tribunal for the Law of the Sea, 26 August 1999 38 ILM 1624 (1999), 117 ILR 148, Annex VII arbitration, Washington, May 2000, 119 ILR 508 (senior counsel for Australia).

5. *Islamic Republic of Iran v. United States of America, Case No. A30* (Iran-United States Claims Tribunal, Full Tribunal, pending) (counsel for Iran)

6. *Eritrea/Ethiopia Boundary Commission* (Boundary Commission under the auspices of the Permanent Court of Arbitration) 41 ILM 1057 (counsel for Eritrea)

7. *Eritrea/Ethiopia Compensation Commission* (Commission under the auspices of the Permanent Court of Arbitration) 42 ILM 1027, 1056, 45 ILM 621 (counsel for Eritrea)

8. *The Volga (Russia v. Australia) (Prompt Release)* (International Tribunal for the Law of the Sea), 42 ILM 159

9. *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Request for Provisional Measures)* 126 ILR 487 (International Tribunal for the Law of the Sea, 2003) (senior counsel for Malaysia)

10. *Barbados v. Trinidad and Tobago* (Annex VII Tribunal under the 1982 Convention) (2006) 45 ILM 798 (senior counsel for Trinidad and Tobago)

11. *Baglihar Dam dispute (Pakistan v. India)* (proceedings before a Neutral Expert under the Indus Waters Agreement) (senior counsel for Pakistan)

12. *Abyei Dispute* (Government of Sudan/Sudan People's Liberation Movement, PCA, senior counsel for Republic of Sudan)

Plus counsel for applicant or respondent in numerous arbitrations (ICC, UNCITRAL, ICSID, NAFTA, etc.)

Experience as judge/arbitrator:

Judge, OECD Administrative Tribunal (1993, reappointed 1996, 1999, 2002)

Dat?ol Power Company v. State of Maharashtra (ad hoc arbitration under UNCITRAL Rules, 1995) (interim award on jurisdiction and arbitrability, 7 February 1996, subsequently settled by consent order) (President of the Tribunal)

Larsen v. Hawaiian Kingdom (presiding arbitrator; ad hoc arbitration under the auspices f the Permanent Court of Arbitration, award terminating arbitration, February 2001), 119 ILR 566

Newfoundland/Nova Scotia, Maritime Boundary Arbitration (member of Tribunal, appointed by the Government of Canada) first phase, Fredericton, Award of 17 May 2001, 128 ILR 453; second phase, Award of 26 March 2002 128 ILR 504

Companta de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic (ICSID Case No ARB/97/3), Decision of 3 July 2002, 41 ILM 1037, 125 ILR 43, 6 ICSID Reports 330, 340 (member of ad hoc Committee)

Mondev International Ltd v. United States of America (ICSID Case No ARB(AF)/99/2), Award of 11 October 2002, 42 ILM 85; 125 ILR 98, 6 ICSID Reports 192 (member of Tribunal)

Waste Management, Inc v. United Mexican States (ICSID Case No. ARB(AF)/00/3) (President), Decision on Preliminary Objection, 24 July 2002, 41 ILM 1315, 6 ICSID Reports 549, Award,

30 April 2004, 11 ICSID Reports 361 (President of Tribunal)

Yaung Chi Oo Trading Pte Ltd v Government of Myanmar (ASEAN Case No ARB 01/1, member of Tribunal), Final Award, 31 March 2003, 42 ILM 540 (member of Tribunal)

Case concerning the MOX Plant, Republic of Ireland v. United Kingdom (Arbitration under UNCLOS Annex VII) 42 ILM 1118, 126 ILR 310 (party-appointed arbitrator for Republic of Ireland)

SGS Société Générale de Surveillance SA v Republic of the Philippines (ICSID Case No ARB/02/6) decision on jurisdiction and admissibility, 29 January 2004, 8 ICSID Reports 515; 129 ILR 444 (member of Tribunal)

JacobsGibb Limited v The Hashemite Kingdom of Jordan (ICSID Case No ARB/02/12) (party-appointed arbitrator, settled)

EnCana Corporation v Government of the Republic of Ecuador (2006) 12 ICSID Reports 400 (President of the Tribunal)

ZG Specialty Insurance Co v. Sovereign Risk Insurance Ltd (AAA Arbitration) (member of the Tribunal, settled)

Republic of Armenia v. Helennic Telecommunications Organization SA (ICC Arbitration 10905/ ACS/FM) (member of the Tribunal, settled)

Channel Tunnel Group Ltd & Another v. Secretary of State for Transport & Another (President of the Tribunal), Partial Award of 30 January 2007, 132 ILR 1

Tembec Inc. v. United States of America (NAFTA Chapter 11 Arbitration) (member of Tribunal, consolidated)

MTD Equity Sdn Bhd v. Republic of Chile (ICSID Case ARB/01/07) (member of annulment Committee) (decision of 21 March 2007)

CMS Gas Transmission Co v. Argentine Republic (ICSID Case ARB/01/08) (member of annulment Committee) (decision of 25 September 2007)

Asian Village Antigua Limited v. Government of Antigua and Barbuda (UNCITRAL Arbitration under the auspices of the LCIA) (Sole arbitrator), Award of 28 September 2007

Chemtura Corporation v. Government of Canada (NAFTA Chapter 11 Arbitration, member of Tribunal, pending)

Trans Global Petroleum Inc v. Hashemite Kingdom of Jordan (ICSID Arbitration, member of Tribunal, settled)

Liman Caspian Oil BV & NCL Dutch Investment BV v. Republic of Kazakhstan (ICSID Case No ARB/07/14, member of Tribunal, pending)

Railroad Development Corporation v. Republic of Guatemala (ICSID Case No ARB/07/23, member of Tribunal, pending)

Expert witness before national courts:

1. *Trade Practices Commission v. Australia Meat Holdings Pty Ltd* (1988) 83 Australian Law Reports 299 (Federal Court of Australia, Wilcox J)

2. *Schexnider v. McDermott International Inc* (DC, La (WD), 1988, Civil Action No 81-2358) (evidence on oath for plaintiff).

3. *Simoneaux v. McDermott International Inc* (SC, La, 1989) (evidence on deposition for plaintiff).

4. *Propend Pty Ltd v. Singh & Commissioner for the Australian Federal Police* (UK High Court, Laws J, 1996, CA, 1997, leave to appeal to the House of Lords refused) (evidence on oath for defendant, evidence upheld on appeal), 111 ILR 611.

5. Adviser to and Expert Witness on behalf of the Department of Justice, Government of Canada, *Reference re Secession of Quebec* (Canada, Supreme Court), 115 ILR 536.

6. *Citoma Trading Ltd v. Federative Republic of Brazil*, Court of Appeal, 1999, on appeal from *JH Rayner (Mincing Lane) Ltd & ors v. Cafenorte SA Importadora & ors* [1999] 1 All ER (Comm) 120.

7. Expert Witness on behalf of the Department of Justice, Government of Canada, *Democracy Watch and another v. Attorney General of Canada* (Ontario Superior Court of Justice, Court file 01-CV-211576).

8. Expert Witness on behalf of the Department of Justice, Government of Canada, *Council of Canadians and another v. Attorney-General of Canada* (Ontario Superior Court of Justice, Court file Court File No. 01-CV-208141), reprinted in (2005) 2(5) *Transnational Dispute Management*.

9 Expert witness on behalf of Talisman Energy Inc , *Presbyterian Church of Sudan & others v Talisman Energy, Inc & Republic of Sudan*, 244 F Supp 289 (DNY, 19 March 2003), F3d (2nd Ct, 2 October 2009) and on certiorari to the Supreme Court (June 2010)

In addition, expert reports on international law in numerous arbitrations

Counsel before national courts

R v. Lyons and others, [2002] 4 All ER 1028 (HL) (junior counsel for the Appellants)

R (Al Jeddah) v Secretary of State for Defence, [2007] UKHL 58 (senior counsel for the interveners, Liberty & Justice)

The Republic of Croatia v The Republic of Serbia, [2009] EWHC 1559 (Ch) (senior counsel for Croatia)

Miscellaneous

Legal Adviser to the Crown Prince of Jordan, Israel Jordan Treaty of Peace, Araba Crossing Point, 26 October 1994 (1995) 34 ILM 43

Retained by Shipping Conference Services to advise foreign shipping companies on application of Australian legislation to conference trades (1988 93, 1996, 2000, 2004)

BOOKS

The Creation of States in International Law (Oxford, Clarendon Press, 1979) i-xxviii, 1-498

The Rights of Peoples (editor) (Clarendon Press, Oxford, 1988, paperback, 1992) i-x, 1-236

The Law of the Sea in the Asia Pacific Region (editor, with DR Rothwell) (Nijhoff, Dordrecht, 1995) ix + 282 pp. (coedited with Philip Alston) The Future of UN Human Rights Treaty Monitoring (Cambridge, Cambridge University Press, 2000) i-xxx, 1-530

The ILC's Articles on State Responsibility: Introduction, Text and Commentaries (Cambridge, Cambridge University Press, 2002) xxviii + 384pp ; also published in French as *Les articles de la C.D.I. sur la responsabilité de l'État. Introduction, texte et commentaires* (Pedone, Paris, 2003), xvi & 461 and in Spanish as *Los artículos de la Comisión de Derecho Internacional sobre la Responsibilidad Internacional des Estado. Introducción, texto y commentarios* (Dykinson, Madrid, 2004), 461

International Law as an Open System. Selected Essays (Cameron & May, London, 2002) pp. 1-607

Australian Courts of Law (4th edn with Brian Opeskin, Oxford University Press, Melbourne, 2004) xii, 1-308

Foreign Investment Disputes: Cases, Materials and Commentary (with R Doak Bishop and W Michael Reisman) (Kluwer Law International, The Hague, 2005) lv + 1653

Rights in One Country: Hong Kong and China (University of Hong Kong, 2005) (1-xviii, 1-42)

The Creation of States in International Law (2nd edn, Oxford University Press, 2006) i-lxii, 1-870

The Law of International Responsibility (edited with A Pellet & S Olleson) (Oxford, OUP, 2010) i-lxv, 1-1296

EDITORIAL

Editor, *Adelaide Law Review*, Vol 3 No 3 (1969); Vol 5 Nos 2-4 (1974-6), Vol 6 Nos 1-3 (1977-8).

Joint Editor, "The Aborigine in Comparative Law", (1987) 2 *Law and Anthropology* (Austria) i-viii, 1-457.

Consultant Editor, Japanese Study Group (Y Onuma & others) on Grotius, *De Iure Belli ac Pacis*: *published as Y Onuma, A Normative Approach to War. Peace, War, and Justice in Hugo Grotius* (Oxford, Clarendon Press, 1993) xvii + 421.

Editor, International Law Association, *Report of the 64th Biennial Conference*, Queensland, 19-25 August 1990 (ILA, London, 1991)

Co-Editor, International Law Association, *Report of the 65th Biennial Conference*, Cairo, 21-26 April 1992 (ILA, Cairo, 1993)

Co-Editor, International Law Association, *Report of the 67th Biennial Conference*, Helsinki, 11-18 August 1996 (ILA, London, 1997)

Editor, *British Yearbook of International Law* (1994-99), Senior Editor (2000-)

Co-Editor, Cambridge Studies in International and Comparative Law (1996-)

Member of Editorial Panel, *World Trade Review* (2002-2005)

Member of Board of Editors, *American Journal of International Law* (2004-)

Co-editor, *ICSID Reports* (2002-)

OFFICIAL REPORTS

1. ALRC 24, *Foreign State Immunity* (AGPS, Canberra, 1984) i-xxiv, 1-168 (Commissioner in Charge). The Summary of Recommendations and Draft Legislation appended to the Report is reproduced in 23 ILM 1398. Legislation to implement the Report was enacted: Foreign States Immunities Act 1985 (Cth), 25 ILM 715.

2. ALRC 31, *The Recognition of Aboriginal Customary Laws* (AGPS, Canberra, 1986) Summary volume: i-xvii, 1-104; Vol 1: i-xxxix, 1-507; Vol 2: i-xvi, 1-415 (Commissioner in Charge).

3. ALRC 33, *Civil Admiralty Jurisdiction* (AGPS, Canberra, 1986) (Commissioner in Charge) i-xxi, 1-393. Legislation to implement the Report was enacted: Admiralty Act 1988 (Cth); Admiralty Rules 1988 (Cth).

4. Constitutional Commission, Australian Judicial System Advisory Committee, *Report* (AGPS, Canberra, 1987) (Member).

5. ALRC 48, *Criminal Admiralty Jurisdiction and Prize* (AGPS, Canberra, 1990) (Commissioner in Charge) i-xvi, 1-210.

GOVERNMENTAL NOMINATIONS AND CONFERENCES

1. Member of the Australian delegation to UNESCO General Conference, Sofia, October

1985. See UNESCO General Conference, Report of the Australian Delegation (AGPS, Canberra, 1986) 36-43.

2. Leader of the Australian Observer Delegation, Asian African Legal Consultative Committee, Bangkok, January 1987.

3. Australian nominee as a conciliator included in the list maintained by the Secretary-General for the purpose of constituting the conciliation commission provided for by the Annex to the Vienna Convention on the Law of Treaties 1969.

4. Adviser, Australian delegation to the United Nations General Assembly, Sixth Committee, 43rd Session, 1988; 44th Session, 1989; 45th Session, 1990; 46th Session, 1991.

5. Member, International Law Commission (1992-2001).

- Responsible for drafting the Working Group Report (*ILC Yearbook* 1992 vol II pt 2, 58-80) and Draft Statute (1993) on an International Criminal Court. For the text of the latter see (1994) 33 ILM 253. Chair of the Working Group (1994): see Working Group on a Draft Statute for an International Criminal Court, *Report of the Working Group* (A/CN.4/L.491/Rev.2 & Add.1-2, 14, 18, 19 July 1994): see ILC Ybk 1994/II (2) 18-74, text also in A. Watts, *The International Law Commission 1949-1998. Volume II. The Treaties* (Oxford, Oxford University Press, 2000) 1454-1552.

- Responsible for drafting Report on Working Methods of the Commission, published in *ILC Report 1996*, Annex 1.

- Special Rapporteur on State Responsibility (1997-2001).

  First Report on State Responsibility (A/CN.4/490 & Adds. 1-5, 1998), *ILC Ybk* 1998 vol II (pt 1) pp 1-80

  Second Report on State Responsibility (A/CN.4/498 & Adds. 1-4, 1999), *ILC Ybk* 1999 vol II (pt 1) pp 3-100

  Third Report on State Responsibility (A/CN.4/507 & Adds. 1-4, 2000), *ILC Ybk* 2000 vol II (pt 1) pp 3-111

  Fourth Report on State Responsibility (A/CN.4/517 & Add. 1, 2001)

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22nd Freshfield Lecture on International Arbitration, London, December 2007

First Michael Kirby Lecture, Canberra, June 2008

Josephine Onoh Memorial Lecture, University of Hull Law School, 26 November 2008

No. 09-1418

JUN 23 2010

IN THE

Supreme Court of the United States

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A., FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the Estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KEIGWONG RAT, LUKA AYOUL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG,

Petitioners,

v.

TALISMAN ENERGY INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* PROFESSOR MALCOLM N. SHAW IN SUPPORT OF CONDITIONAL CROSS-PETITIONER

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INTEREST OF THE *AMICUS CURIAE* [1]

Amicus curiae respectfully submits this brief pursuant to Supreme Court Rule 37 in support of the Conditional Cross-Petitioner. *Amicus* is the Sir Robert Jennings Professor of International Law at the University of Leicester, UK, and a practising barrister at Essex Court Chambers, London, with the rank of Queen's Counsel. *Amicus'* CV appears as an appendix to this brief. *Amicus* believes this submission will assist the Court regarding pertinent jurisdictional rules of international law as they may bear on the issues raised in this appeal.

SUMMARY OF ARGUMENT

In *Sosa*, this Court required that the Alien Tort Statute ("ATS") be interpreted in the light of customary international law and that any alleged custom must be "specific, universal and obligatory." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). International law requires that the practise of States underpinning any custom must be extensive and virtually uniform. It is my conclusion that there is no rule of international law providing for jurisdiction that would cover the instant case.

Jurisdiction in international law is a permissive rule that focuses upon permitted primary jurisdiction

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[1] No counsel for any party authored this brief either in whole or in part. The written consents of petitioners and respondent to the filing of this brief have been filed with the Clerk. Counsel for respondent received timely notice of intent to file this brief. Counsel for petitioners received such notice seven days prior to the filing, but waived the ten-day notice requirement of Rule 37.2(a). Respondent-Conditional Cross-Petitioner Talisman Energy Inc. has compensated me for my time spent preparing this submission.

(essentially territorial or national). Beyond this, universal criminal jurisdiction is exceptional and carefully circumscribed. It requires that the offense in question be of a heinous nature and that the offense be so recognized by the States of the international community. Further, it is predicated upon the inability or unwillingness of the primary jurisdictions (territorial or national) to take action. Finally, it is almost universally accepted that the absence of the alleged offender constitutes a bar to the exercise of jurisdiction. The concept of universal criminal jurisdiction does not constitute an open license to exercise judicial authority with regard to offenses committed abroad by non-nationals against non-nationals.

Even less well established in international law is the exercise of universal civil jurisdiction founded upon asserted violations of international criminal law. At the very least, such exercise would have to meet the requirements of universal criminal jurisdiction. In addition, any purported exercise of universal civil jurisdiction is contingent upon satisfaction of the principle of reasonableness. Of the factors that are relevant to this principle would be the degree of connection between the court asserting jurisdiction and the essence of the dispute concerning the conduct abroad of foreign parties. Another relevant factor would be whether a State with a primary jurisdictional link (*e.g.* territoriality or nationality) could provide a fair and effective alternative forum. The failure to exhaust domestic remedies in an appropriate jurisdiction also constitutes a pertinent factor in any consideration of the existence or not of an asserted universal civil jurisdiction.

It is concluded that the assertion of jurisdiction in this case over Talisman Energy based upon the

contacts of Fortuna (U.S.) Inc. ("Fortuna"), one of Talisman's subsidiaries, with the State of New York is unreasonable and thus contrary to principles of international law and comity relating to civil jurisdiction. This is particularly so upon a consideration of the fact that the connection between Fortuna and Talisman Energy with regard to the events in Sudan giving rise to the claims is non-existent and that Canada, the State of registration of Talisman Energy, possesses a credible and independent legal system with a high standard. Indeed, Canada has objected to the exercise of the U.S. courts' jurisdiction.

In addition, I have come to the conclusion that there is no rule of customary law with the necessary support of States providing for corporate liability.

ARGUMENT

I. The U.S. District Court's Assertion Of Jurisdiction In This Case Involving Claims By Sudanese Plaintiffs Against A Canadian Corporation Based On Events That Occurred In Sudan Is Contrary To International Law And Comity.

A. International Law Requires Near Universal Acceptance in Order to Create an International Norm.

A rule of customary international law is one defined as "evidence of a general practice accepted as law." Statute of the International Court of Justice, Art. 38. This requires careful consideration of concrete evidence of the customs and practices of States. *See, e.g., Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 250, 252 (2d Cir. 2003). The International Court of Justice has emphasised that:

> an indispensable requirement would be that within the period in question, short though it may be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked and should moreover have occurred in such as way as to show a general recognition that a rule of law or legal obligation is involved.

North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 43 (Feb. 20). *See also Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 108-09 (June 27).

The standard thus required of the norm of customary law alleged is accordingly high. In *Filartiga v. Pena-Irala* it was characterised as "clear and unambiguous." 630 F.2d 876, 884 (2d Cir. 1980); in *Kadic v. Karadjic* as "well-established" and "universally recognized." 70 F.3d 232, 239 (2d Cir. 1995); and in *Sosa* as "specific, universal and obligatory." 542 U.S. at 732. It is as well in this context to note the comment of Lord Oliver in the House of Lords decision in *JH Rayner v. Dep't of Trade & Ind.*, to the effect that

> A rule of international law becomes a rule – whether accepted into domestic law or not – only when it is certain and is accepted generally by the body of civilized nations, and it is for those who assert it to demonstrate it, if necessary before the International Court of Justice. It is certainly not for a domestic tribunal in effect to legislate a rule into existence for the purposes of domestic law and on the basis of material that is wholly indeterminate.

[1990] 2 AC 418, 513.

B. The *Sosa* "Paradigms" Reflect the Restrictive Nature of Jurisdiction in International Law

This Court in *Sosa* determined that any asserted rule of customary international law required within the context of the Alien Tort Statute ("ATS") needed to be defined with a "specificity comparable to the features of the 18th-century paradigms we have recognized" and "acceptance as widespread." 542 U.S. at 725, *id.* at 760 (Breyer J., concurring). Such paradigms were Blackstone's "three primary offenses: violation of safe conducts, infringement of the rights of ambassadors and piracy." *Id.* at 724. It is important to note that two of these offenses were committed *within* the forum State against foreign nationals and it was found necessary to establish the forum State's jurisdiction and provide redress in order to prevent "serious consequences in international affairs" up to and including resort to war. *Id.* at 715. Piracy was the only offense committed outside of the jurisdiction of the forum State. Indeed being committed on the high seas, piracy was outside of the jurisdiction of all States as such. *Id.* at 762 (Breyer, J., concurring) (citing *United States v Smith*, 5 Wheat. 153, 162 (1820)).

It *is*, thus, *clear* that *none* of the *Sosa* paradigms concern the proscription of conduct that has taken place within the territorial boundaries of another sovereign state, precisely the situation at issue in the current litigation.

International law allows for the exercise of jurisdiction by a State in carefully circumscribed situations. Matters that fall without permitted limits would not be accepted in international law and by third States as a valid exercise of jurisdiction. The permitted

situations are defined in terms of the following: conduct occurring on the territory of the State (the territorial principle), conduct engaged in by its own nationals (the nationality principle), conduct by non-nationals that is directed against the security of the State (the protective principle), and in more limited circumstances, conduct by non-nationals directed against nationals abroad (the passive personality principle) and conduct outside its territory that has or is intended to have substantial effect within its territory (the effects doctrine). *See Oppenheim's International Law*, 458 (9th ed. 1992). *See also Restatement (Third) of the Foreign Relations Law of the United States* ("Restatement"), § 402 (1987). Jurisdiction exercised by a State on the basis of the above principles would be seen as falling within the scope of international legality and legitimacy. The international norm is permissive rather than obligatory and it is for each State to formulate its national jurisdictional requirements as it wishes, so long as the required international legal framework is complied with. In any event, none of the traditional bases of jurisdiction set out above apply in the current situation.

C. Universal Criminal Jurisdiction is Only Recognized, if at all, In Extremely Limited Circumstances.

Beyond the traditional bases of jurisdiction noted in the previous paragraph, a State may exercise universal jurisdiction in limited circumstances with regard to certain offenses regarded by the international community as of universal concern. This is an exceptional jurisdiction and flows from the heinous nature of the crime itself coupled with the clear recognition as such by the international community

Most States and scholars advocate a cautious approach to the exercise of universal jurisdiction "which should be governed by clear rules in order to ensure legal certainty, to guarantee a fair trial for the accused and to prevent the abuse of universal jurisdiction for political ends." Florian Jessberger, *Universal Jurisdiction*, in The Oxford Companion to International Criminal Justice, 556 (Antonio Cassese ed.-in-chief 2009). The Institut de Droit International adopted a resolution on Universal Criminal Jurisdiction in 2005 in which it stressed that, "the jurisdiction of States to prosecute crimes committed by non-nationals in the territory of another State must be governed by clear rules in order to ensure legal certainty, and the reasonable exercise of that jurisdiction." *http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf*. Strong U.S. and international pressure led to the 2003 Belgian amendment to its extensive 1993 and 1999 universal criminal legislation. *See* S. Ratner, *Belgian War Crimes Statute: A Postmortem*, 97 The American Journal of International Law, No. 4, 888 (Oct. 2003).

1. Universal Criminal Jurisdiction Only Applies to a Very Limited Set of International Law Violations.

That offenses deemed subject to universal jurisdiction are those of a particularly heinous nature is amply reflected in the list of offenses argued to fall within this form of jurisdiction, such as genocide, war crimes and crimes against humanity. There is thus a qualitative requirement. Such crimes are those regarded as being "directed against the most fundamental legal interests of the international community—such as world peace and international security." Jessberger, at 556. This is a high threshold and

it should be emphasized that Talisman Energy is not accused of having directly committed such crimes.

There is also a quantitative requirement forming part of the definition of crimes of universal jurisdiction. This is that the offenses in question are "regarded by the community of nations as of universal concern." *Restatement*, § 404. Accordingly, a high level of consensual State practice is necessitated. This is an indispensable requirement. Any claim that a particular offense falls within the context of universal jurisdiction must, therefore, be maintained by clear evidence that, first, all or virtually all States have accepted the conduct in question as constituting an offence and, secondly, that such States have recognized such conduct as constituting an offense of the necessary heinous nature.

The Court of Appeals noted in *United States v. Yousef*, 327 F.3d 56, 103 (2d Cir. 2003), that "the universality principle permits jurisdiction over only a limited set of crimes that cannot be expanded judicially." Such expansion can only take place on the basis of the State consent tests as noted above. Evidence is entirely lacking as to the international acceptance of aiding and abetting or conspiratorial conduct (the only offenses that Talisman Energy has been accused of) as constituting the requisite heinous conduct for the purposes of universal criminal jurisdiction, even assuming that international law recognizes corporate liability for complicit conduct (which is denied).

Even with regard to offenses commonly mentioned in this context, care needs to be exercised. Piracy is an offense against international law, but universal jurisdiction may only be exercised with regard to piracy on the high seas or other areas outside of the

national jurisdiction of States and not elsewhere. *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397. Other offenses laid down in international conventions, such as terrorism, drug-trafficking and torture, do not provide as such for universal jurisdiction, but set out a jurisdictional framework as between the contracting States founded upon the traditional bases for the exercise of jurisdiction. *See, e.g.*, United Nations Convention against Torture, Art. 5, Dec. 10, 1984; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Art. 4, 1988; International Convention Against the Taking of Hostages, Art. 5, *opened for signature* Dec. 18, 1979; International Convention for the Suppression of Terrorist Bombings, Art. 6, *adopted* Dec. 15, 1997. This caution is reflected in the current consideration by the Sixth (Legal) Committee of the United Nations General Assembly of the question of the scope and application of the principle of universal jurisdiction. *See* G.A. Res. 64/117, U.N. Doc. A/64/452 (Dec. 16, 2009).

2. Universal Criminal Jurisdiction is a Subsidiary Form of Jurisdiction.

The Institut de Droit International resolution emphasised that, "all States bear primary responsibility for effectively prosecuting the international crimes committed within their jurisdiction or by persons under their control" and referred to universal criminal jurisdiction as "an *additional* ground of jurisdiction." *http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf* (emphasis added). It should be emphasised that Canada, the State of nationality of Talisman Energy, has been willing to exercise jurisdiction and has expressly objected to the exercise of U.S. court jurisdiction for that reason.

The presumption in favour of territorial jurisdiction is strong. Wherever possible, States will, naturally, not only prosecute all offenses taking place on their territory, but will leave the prosecution of offenses taking place abroad to the State in whose territory the offense has been committed. Indeed, the United Nations anti-terrorist treaties positing the exercise of an expanded jurisdiction with regard to alleged offenders require the prosecution or extradition of any alleged offender found within the territory of the State exercising jurisdiction. *See, e.g.*, International Convention against the Taking of Hostages, Art. 5, International Convention for the Suppression of Terrorist Bombing, Art. 6, International Convention for the Suppression of Acts of International Terrorism, Art. 10.

This is for obvious reasons of respect for State sovereignty and the practical advantages of allowing for the exercise of jurisdiction by the State on whose territory the bulk of witnesses and evidence may be found. Judge Guillaume in his Separate Opinion in *Arrest Warrant of April 11, 2000 (Congo v. Belg.)*, 2002 I.C.J. 3, 43-44 (Feb. 11), concluded that:

> States primarily exercise their criminal jurisdiction on their own territory. In classic international law, they normally have jurisdiction in respect of an offence committed abroad only if the offender, or at least the victim, is of their nationality, or if the crime threatens their internal or external security. Additionally, they may exercise jurisdiction in cases of piracy and in the situations of subsidiary universal jurisdiction provided for by various conventions if the offender is present on their territory. But apart from these cases, international law does not

> accept universal jurisdiction, still less does it accept universal jurisdiction *in absentia*.

During the course of the debates in Parliament on the International Criminal Court Bill, the Parliamentary Under Secretary of State of the UK Foreign Office declared that

> The primary responsibility for the investigation of crimes committed outside of the United Kingdom lies with the state where the crime occurred, or whose nationals were responsible . . . . The British criminal justice system is based on a territorial link to the United Kingdom and there are significant practical difficulties when our courts have to prosecute crimes that have taken place elsewhere in the world . . . . It is our policy to assume universal jurisdiction only where an international agreement expressly requires it.

620 PARL. DEB., H.L. (5th ser.) (2001) 928-29.

The requirement for the exercise of universal jurisdiction by domestic courts in the case of the egregious crimes noted above essentially arises due to the inability or unwillingness of the primary jurisdictional States (that is the State on whose territory the alleged offense has taken place or the State of nationality of the alleged offender) to prosecute and where there is no relevant international court or tribunal with the requisite jurisdiction. In terms of international legal policy, the aim is to prevent the legal impunity of those committing heinous offenses. *See, e.g.*, Rome Statute of the International Criminal Court, Preamble, July 12, 1999. It follows, therefore, that where the relevant territorial or national State is willing and able to take action, the need for a

domestic court of a third State to exercise universal jurisdiction falls away.

This point may be taken further. The exercise of universal jurisdiction by the domestic court of a third State may indeed raise issues concerning priority of jurisdiction and the danger of offending the principle of non-intervention. As a matter of general legal principle, the territorial State or the national State are accorded primacy as against other States with regard to the exercise of jurisdiction (and in the absence of a relevant international court or tribunal). *See, e.g.*, Jessberger, at 557, who emphasises that "[t]he exercise of universal jurisdiction should be understood as a fall-back mechanism activated only if no primary jurisdiction is willing and able to genuinely prosecute the crime."

The jurisdictional structure of the International Criminal Court, which accords primacy of jurisdiction in pertinent cases (genocide, war crimes, and crimes against humanity) to either the territorial or national State, is of relevance here. The Statute of the International Criminal Court makes it clear that that court can only exercise jurisdiction upon the failure or unwillingness of the territorial or national State as the case may be to so act. *See* Rome Statute, Arts. 12, 17; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 335 *et seq.* (Oxford University Press 2010).

Justice Breyer, in his concurring opinion in *Sosa*, indeed questioned whether the exercise of jurisdiction under the ATS was "consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement." 542 U.S. at 761. Such comity concerns arise, he noted, when

"foreign persons injured abroad bring suit in the United States under the ATS, asking the courts to recognize a claim that a certain kind of foreign conduct violates an international norm." *Id.* The need to work towards international harmony does not automatically mean that even if there is harmony as to substantive regulation across relevant States, then universal jurisdiction is appropriate. *Id.* at 761-62. Justice Breyer emphasized that the key to extra-territorial jurisdiction concerned "procedural consensus" and the absence of this would constitute a factor in concluding that the ATS would not apply in any given situation. *Id.* at 763.

3. Universal Criminal Jurisdiction Requires That the State Exercising Such Jurisdiction Have Custody of the Defendant.

The Institut de Droit resolution described above (*see* p. 7, above) emphasizes that the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting State or on board a vessel flying its flag or an aircraft which is registered under its laws, or other lawful forms of control over the alleged offender. Judge Guillaume in his Separate Opinion in the *Arrest Warrant* case declared clearly that international law did not accept the concept of universal jurisdiction *in absentia*. *See* p. 11, above. The presence of the accused is usually required in order to conduct the necessary investigations and to compile and order evidence and deal adequately with witnesses. This position is reinforced by awareness of the dangers that may exist with regard to double jeopardy (*ne bis in idem*) and politicisation.

The District Court held that it could exercise personal jurisdiction over Talisman Energy in this case in view of the contacts of Fortuna with the State of New York. *Presbyterian Church of Sudan v. Talisman Energy Inc.*, No. 01 Civ. 9882, 2004 WL 1920978 (S.D.N.Y. Aug. 27, 2004). However, such contacts would not suffice to comply with the requirements laid down in international law concerning the exercise of universal criminal jurisdiction, even assuming that international law recognizes corporate liability (which is denied). It is to be particularly noted that Fortuna's contacts with Talisman Energy are entirely unrelated to events in Sudan giving rise to the claims.

In summary, the following propositions may be concluded as to universal criminal jurisdiction as a matter of international law. First, the offense has to attain a high level of egregious or heinous behaviour. Second, universal criminal jurisdiction is a subsidiary form of jurisdiction only exercised where the State or States of primary jurisdiction cannot or will not act. Third, it is accepted by most States, particularly those of the common law tradition, that the presence of the alleged offender is required. The concept of universal criminal jurisdiction does not constitute an open license to exercise judicial authority with regard to offenses committed abroad by non-nationals against non-nationals.

D. The Expansive Exercise of Domestic Civil Jurisdiction Based on Violations of International Criminal Law Is Contrary to International Law.

This Court in *Sosa* made the point that it was one thing for American courts to enforce constitutional limits on U.S. State and Federal governments' powers,

"but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed these limits." 542 U.S. at 727. This principle would apply logically where the inevitable consequence of a civil action against a foreign corporation necessarily implied a judgment on the actions of a third State. It should be underlined that the Canadian government's brief concluded that "[a]ssertions of jurisdiction in this action, as a practical consequence, would infringe on Canada's conduct of foreign policy and its relations with other States." Brief of Amicus Curiae The Government of Canada in Support of Dismissal of the Underlying Action at 11, *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 582 F.3d 244 (2d Cir. 2009) (07-cv-0016).

Since the ATS must be interpreted in the light of international law, it is important to draw attention to the point made by Judges Higgins, Kooijmans and Buergenthal in their Separate Opinion in the *Arrest Warrant of April 11, 2000 (Congo v. Belg.)*, 2002 I.C.J. at 77, that the ATS could be seen as the "beginnings of a very broad form of extraterritorial jurisdiction" in the civil sphere, but that "it has not attracted the approbation of States generally." The House of Lords has underlined this position, noting that the ATS and related caselaw do not express principles that are widely shared and observed among other nations. *See, e.g., Jones v. Saudi Arabia* [2006] UKHL 26 at ¶ 20.

This is far from the "procedural consensus" test propounded by Justice Breyer, which would help determine the applicability of the ATS in any particular situation. The views of academic writers, which in

themselves do not constitute sources of international law, but merely evidence as to what the relevant rules may or may not be, are clearly divided. *See, e.g.*, M. Akehurst, *Jurisdiction in International Law*, 46 British Year Book of International Law 145, 177 (1972-73); F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 Recueil des Courts 1, 73-81 (1964); F. A. Mann, *The Doctrine of Jurisdiction in International Law Revisited After Twenty Years*, 186 Recueil des Cours, 19, 20-33, 67-77 (1984).

This Court in *Sosa* noted that the possible collateral consequences of making international rules privately actionable argue for judicial caution and constituted a reason for the "high bar to new private causes of action for violating international law." 542 U.S. at 727. Amongst such consequences were the potential implications for the foreign relations of the U.S. in recognizing such causes and this "should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* Attempts by federal courts to craft remedies for the violation of new norms of international law "would raise risks of adverse foreign policy consequences" and "should be undertaken, if at all, with great caution." *Id.* at 727-28. Although this Court referred to "a policy of case-specific deference to the political branches" that need not be applied in the *Sosa* case itself, it did note that a number of class actions were pending seeking damages from corporations alleged to have participated in or abetted the former apartheid regime in South Africa and concluded that "In such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Id.* at 733 n.21. The U.S. government argued in its brief in this case

before the Court of Appeals that "claims under the ATS should not be recognized if they arise within the jurisdiction of another sovereign" and declared that "[o]ne of the 'practical consequences' of embracing civil aiding and abetting or civil conspiracy liability for ATS claims would be an uncertainty that would interfere with the ability of the U.S. Government to employ its full range of foreign policy options . . . [and] would inevitably lead to greater diplomatic friction for the United States." Brief for the United States as *Amicus Curiae* at 10, 19-21, *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 582 F.3d 244 (2d Cir. 2009) (07-cv-0016).

Even if one were to assume that international law permitted the exercise of a universal civil jurisdiction, which is denied, a State may not exercise jurisdiction with respect to a person or activity having connections with another State when the exercise of such jurisdiction is unreasonable.

Brownlie concludes that extraterritorial acts can only be the object of jurisdiction if *inter alia* there is a "substantial and bona fide connection between the subject-matter and the source of the jurisdiction," *Principles of Public International Law*, 311 (7th ed., 2008) ("Brownlie"). It may be concluded, therefore, that paucity of connection between the court asserting jurisdiction and the essence of the dispute concerning the conduct abroad of foreign parties would be one such "unreasonable" factor. Another relevant factor would be where a State with a primary jurisdictional link (*e.g.* territoriality or nationality) could provide a fair and effective alternative forum. *See, e.g.*, D. F. Donovan & A. Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 Am. J. of Int'l L. 142, 145 (2006). Such would be the case

with regard to Canada, the State of nationality of Talisman Energy. *See also F. Hoffman La Roche Ltd v. Empagran S A.*, 542 U.S. 155, 164 (2004), noting that this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.

There is a further point at this stage and that is the application of the international law requirement of the exhaustion of domestic remedies. This is a principle of long-standing whereby before a person can take action on the international level, the domestic remedies of the relevant jurisdiction must first be exhausted. *See, e.g.*, Brownlie, at 473, 492-502. Such a requirement may apply in circumstances such as the present as the ATS requires going to international law and this principle constitutes one of the relevant principles of international law. The Torture Victim Protection Act 1991 provides in section 2(b), in the context of civil action, that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." Indeed this Court in *Sosa* left the matter open in referring to the European Commission *amicus curiae* brief's claim that domestic remedies need to be exhausted and concluding that "[w]e would certainly consider this requirement in an appropriate case." 542 U.S. 733 n.21. Justice Breyer also regarded this condition as important in his concurring opinion. *Id.* at 760. In any event, the existence of valid remedies in a State with a much closer connection to the relevant parties than the U.S. must constitute a pertinent reasonableness factor.

The District Court held that under New York jurisdictional rules it had jurisdiction in this case based upon Fortuna's contacts with the State of New York. *Presbyterian Church of Sudan v. Talisman Energy Inc.*, No. 01 Civ. 9882, 2004 WL 1920978 (S.D.N.Y. Aug. 27, 2004). I express no opinion on New York law. However, such exercise of jurisdiction in terms of international law was unreasonable and thus contrary to principles of international law and comity relating to civil jurisdiction. This argument is even stronger when it is taken into account that the connection between Fortuna and Talisman Energy with regard to the events in Sudan giving rise to the claims is non existent and that Canada, the State of registration of Talisman Energy, possesses a credible and independent legal system with a high standard. For US courts to seek to pre-empt the Canadian legal system from adjudicating this dispute may constitute interference with the domestic jurisdiction of Canada.

II. International Law Does Not Recognize Corporate Liability.

In order for Talisman Energy to be brought within the reach of the ATS, it must be shown that international law establishes the direct liability of corporations for breaches of the rules of public international law and that *on the basis of the tests propounded in Sosa* as to widespread acceptance and specificity, duly noting the requirement to exercise "great caution," and the "demanding standard of definition." 542 U.S. at 725, 728, 738 n.30. However, it is very clear that international law does not establish the direct liability of corporations for breaches of international law in any way relevant to the current litigation. *See, e.g., Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 321 (2d Cir. 2007) (Korman, J.,

concurring in part and dissenting in part). There are clear policy reasons underpinning this as significant national variations exist as to the attribution of corporate liability. *See, e.g.*, International Commission of Jurists, 2 Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, 58 (2008); Special Representative of the U.N. Secretary-General (Professor John Ruggie), *Report on Implementation of Gen. Assembly Res. 60/251 of 15 March 2006 Entitled "Human Rights Council,"* U.N. Doc. A/HRC/4/35, ¶ 28 (Feb. 9, 2007). I have seen and agree with Professor Crawford's brief on this matter, Brief of Amicus Curiae Professor James Crawford in Support of Conditional Cross-Petitioner, *Presbyterian Church of Sudan v. Talisman Energy Inc.*, No. 09-1418.

The key point is that both the required practice of states and the *opinio juris* necessary to establish a rule of customary international law are simply absent. General international law does not recognize the international legal personality of multinational corporations. *See, e.g.*, Brownlie, at 66. Further, thus far, no international criminal tribunal has had jurisdiction to try a company as a legal entity for crimes under international law. *See* International Commission of Jurists, at 5. Nor, to the best of my knowledge, have there been any decisions of international courts or tribunals where a corporation has been found liable, either criminally or civilly, for a breach of international law. None of the constituent instruments of the international criminal tribunals thus far established has expressly provided for corporate criminal responsibility. *See* The Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, Art. 6, 82

U.N.T.S. 279, Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 6, May 25, 1993, 32 I.L.M. 1203, Statute of the International Criminal Tribunal for Rwanda, Art. 5, Nov. 8, 1994, 33 I.L.M. 1598. Indeed, the attempt by France to bring corporations within the jurisdiction of the International Criminal Court failed due to the absence of consensus on this matter among national legal systems. Rome Statute, Art. 25; Albin Eser, *Individual Criminal Responsibility in* 1 The Rome Statute of the International Criminal Court: A Commentary 767, 778-79 (A. Cassese *et al.* eds., 2002).

The fact that certain treaties exist that call those States parties to them to impose particular rules upon corporations or other groups or individuals generally does not as such convert such entities into international legal persons as distinct from objects of concern nor does it convert an obligation placed upon States parties into a direct obligation upon such entities. A requirement that States parties to a particular treaty agree under the terms of that treaty to treat a particular pattern of behaviour as criminal *under its own criminal law* is not the same as a provision placing direct liability for a breach of international law upon entities that may include corporations. To take as an example, article 5(1) of the United Nations Convention Against Transnational Organized Crime 2000 provides that "[e]ach State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally . . . ." 2225 *U.N.T.S.* 209. *See also id.* at Arts. 6(1), 7(1), 8(1) and 9(1).

Under article 10(1), States parties agree to "adopt such measures as may be necessary, *consistent with its legal principles*, to establish the liability of

legal persons for participation in serious crimes." (emphasis added). Similar provisions may be found in articles 5(1), 14(1), 15 and 16 of the United Nations Convention Against Corruption 2003, article 4 of the International Convention for the Suppression of the Financing of Terrorism 1999, and article 1 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997. The very fact that in such circumstances, whether with regard to terrorism or corruption or bribery or disposition of hazardous wastes the international community felt it necessary to call upon States parties to the relevant treaties to make particular offences domestic crimes and to prosecute or otherwise implement such provisions within their own legal order demonstrates clearly that international law as such does not impose direct liability upon international corporations.

No human rights treaties impose direct liability upon corporations as such, but rather such treaties typically call upon States parties to respect particular human rights and, in most cases, to report to international bodies upon their implementation of such rights. It was upon an analysis of such treaties that led the United Nations Special Representative for Business and Human Rights to conclude that "it does not seem that the international human rights instruments discussed here currently impose direct liabilities on corporations." *See* Ruggie, at ¶ 44. This was true of the situation as at 2007, it must surely have been the situation during the relevant period for the purposes of this litigation and it remains correct today.

CONCLUSION

For these reasons, the exercise of jurisdiction under the ATS would be contrary to the principles of international law and comity.

Respectfully submitted,

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